(32,403)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 163

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, ET AL., ETC., PETITIONERS,

vs.

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fols. a & 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. Riggs, Henry B. Hutchins, Clarence C. Troup, Karl E. Lingren, George H. Logan, Victor R. Hess, N. Nelson Keen, B. Wheeler Dyer, and William V. Wood, Partners, Trading and Doing Business as Lamborn & Company,

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA

NOTICE OF MOTION FOR JUDGMENT—Filed April 7, 1921

To the National Bank of Commerce of Norfolk, Norfolk, Virginia, a corporation chartered and existing under the [fol. 2] laws of the State of Virginia, with its principal office and place of business in the city of Norfolk, in said State:

Take notice that the undersigned will move the District Court of the United States for the Eastern District of Virginia, at Norfolk, in its court room in said city of Norfolk, Virginia, on Monday, May 2, 1921, between the hours of 10:00 a. m. and 2:00 p. m. on that day, or as soon thereafter as it can be heard, for a judgment in its favor against you for the sum of Forty-Eight Thousand and Nine Dollars and Eighty-One Cents ($48,009.81) with interest thereon from the 20th day of December, 1920, until paid, and the costs of this proceeding.

Said sum became and is due, owing and unpaid by the terms of a certain letter of credit number one hundred and five (105), dated May 11, 1920, issued or established by you in favor of the undersigned through the Bankers' Trust Company of New York, under the terms and conditions therein set forth, as modified and amended by a certain letter written, addressed and delivered by you to the undersigned, dated July 17, 1920, eliminating the requirements in respect to the copy of an ocean bill of lading in

said letter set forth, the undersigned having sold and delivered one thousand (1,000) bags of Java white sugar, of the net weight of two hundred and twenty-two thousand six hundred and eighty (222,680) pounds at twenty-two (22) cents per pound, duty paid, f. o. b. cars Philadelphia, Pennsylvania, landed weights, less two per cent duty, of the price of Forty-Eight Thousand and Nine Dollars and Eighty-One Cents ($48,009.81), and having presented a sight draft with invoice and order notify bill of lading attached, all as required by the terms of said letter of credit, amended as aforesaid, and in all respects complied with, performed and fulfilled each and all of the obligations, conditions and requirements in said letter set forth, upon the performance and fulfillment whereof the undersigned was by the terms of said letter of credit entitled to have paid by you to the undersigned the aforesaid sum, demand for the payment whereof has been duly made, and payment whereof has been refused and declined. The amount in controversy in this cause, exclusive of interest and costs, ex-
[fol. 3] ceeds the sum of $10,000. You are a resident of the State of Virginia, and each of the undersigned is a resident of a state other than the State of Virginia.

Arthur H. Lamborn, a Citizen of New Jersey; Gerard P. Tameling, a Citizen of New York; Chas. C. Riggs, a Citizen of New Jersey; Henry B. Hutchins, a Citizen of New Jersey; Clarence C. Troup, a Citizen of New Jersey; Karl E. Lindgren, a Citizen of Pennsylvania; Geo. H. Logan, a Citizen of New Jersey; Victor R. Hess, a Citizen of New York; N. Nelson Keen, a Citizen of New Jersey; B. Wheeler Dyer, a Citizen of New York; William V. Wood, a Citizen of New Jersey, Partners, Trading and Doing Business as Lamborn & Company, by Baird, White & Lanning, Counsel.

IN UNITED STATES DISTRICT COURT

DENIAL OF LIABILITY AND PLEA OF GENERAL ISSUE—Filed April 11, 1921

The said defendant, The National Bank of Commerce of Norfolk, by its attorney comes and says that it did

not undertake or promise in the manner and form as the said plaintiffs have above hereof complained.

And of this the said defendant puts itself upon the country.

Tazewell Taylor, p. d.

IN UNITED STATES DISTRICT COURT

STATEMENT OF GROUNDS OF DEFENSE—Filed May 3, 1921

And now comes the defendant, The National Bank of Commerce, of Norfolk, by counsel, and states that its [fol. 4] grounds of defense upon which it will rely at the trial of the above entitled action are as follows:

1. That it denies each and every the allegations contained in the notice of motion for judgment filed herein.

2. That it relies upon each and every defense which may be made to the claims asserted by the plaintiffs as are properly provable under the general issue, and in that connection denies and calls for strict proof of each and every item of the charge relied upon by the said plaintiffs.

3. It relies upon the fact that the plaintiffs failed to keep and perform the obligations of the contract which is the subject of this action, so far as the same were to be kept and performed by them.

Tazewell Taylor, P. d.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL STATEMENT OF GROUNDS OF DEFENCE—Filed October 23, 1923

And now comes the defendant, The National Bank of Commerce of Norfolk, by counsel and states that its grounds of defence upon which it will rely at the trial of the above entitled action are as follows:

1. That it denies each and every allegation contained in the notice of motion for judgment filed herein.

2. That it relies upon each and every defence that may be made to the claims asserted by the plaintiffs as are properly provable under the general issue, and in that connection denies, and calls for strict proof of, each and every item of the charges relied upon by the said plaintiffs.

3. It relies upon the fact that the plaintiffs failed to keep and perform the obligations of the contract which [fol. 5] is the subject of this action, so far as the same were to be kept and performed by them.

4. It relies upon the fact that the letter of credit, which is the subject of this action, contemplated the delivery by the plaintiffs of Java White Sugar, whereas the railroad bill of lading, together with other documents, tendered by the plaintiffs and upon which payment under the letter of credit was demanded, did not show a shipment of Java White Sugar, but on the contrary simply Java Sugar, there being at least fourteen varieties of Java Sugar.

5. It relies upon the fact that the letter of credit upon which this action is brought provides as follows:

"Shipment to be made during August-September, 1920, at option of the sellers, from Java by Steamer or Steamers to Philadelphia."

whereas, the fact is that the sugar tendered, in addition to not being of the character and quality designated in the letter of credit, was shipped on the Steamship "West Cheswald," whose destination at the time of shipment was Port Said, option New York, and which after sailing from Port Said to New York was diverted at the instance of the plaintiffs on December 13, 1920, to Philadelphia, it thus being apparent that the sugar in said vessel was never shipped from Java to Philadelphia within the months of August-September, 1920, and its ultimate destination until December 13th, 1920, was New York and not Philadelphia.

6. It relies upon the fact that the plaintiffs having declared the "Chifuen Maru" as the vessel carrying the sugar which was the subject of the letter of credit sued on, had no authority to subsequently declare another vessel, even though said vessel complied in all particulars with the terms of the letter of credit so far as the time, place and

destination of the shipment was concerned, which said substituted vessel in this case did not comply with.

7. It relies upon the fact, in addition to all of the other [fol. 6] defences hereinabove made, that the sugar actually tendered was not shipped on the "West Cheswald" during the months of August-September, 1920.

Tazewell Taylor, Pd.

In United States District Court

Order Granting Leave to Amend the Notice of Motion for a Judgment—Filed November 19, 1923

On motion of the plaintiffs, leave is given them to amend the notice of motion for a judgment herein, and the same is accordingly amended so that said motion shall contain the averment that the National Bank of Commerce of Norfolk is chartered under the National Banking Laws of the United States, instead, as alleged in the notice of motion for a judgment, under the laws of the State of Virginia.

D. Lawrence Groner, United States District Judge.

In United States District Court

Minute Entry—November 19, 1923

This day came the parties by their attorneys, and the defendant for its plea says it did not undertake or promise in the manner and form as set forth in Plaintiff's notice of motion and of this it puts itself upon the country, and the Plaintiffs likewise, and issue is joined.

And thereupon from the jurors duly drawn and in attendance upon this term of the Court, came a jury of twelve, to-wit: L. R. Rawls, Rurick Nottingham, F. S. Hancock, H. C. Cooper, E. A. Watkins, Lawrence Tucker, J. G. Lohman, Samuel D. Hope, R. P. Bunting, R. O. Odom, C. H. Machen, and M. W. Ellis, and who having been as aforesaid duly elected and tried were sworn well and truly to try the issue joined, and having partly heard the evidence

[fol. 7] were adjourned until tomorrow morning at ten o'clock.

D. Lawrence Groner, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

VERDICT AND JUDGMENT—November 20, 1924

This day came again the parties by their attorneys, and the jury appeared pursuant to their adjournment on yesterday, and at the conclusion of all the evidence on behalf of the plaintiffs the defendant, by its counsel, moved the Court to direct a verdict in favor of the defendant, which motion being fully argued the Court doth overrule, to which ruling of the Court the defendant, by its counsel excepted, and at the conclusion of all the evidence the plaintiffs, by their counsel, moved the Court to direct a verdict in their favor, which motion being fully argued the Court doth sustain, to which ruling of the Court the defendant, by its counsel, excepted. And thereupon the jury, under the direction of the Court, returned the following verdict, to-wit: "We, the jury, under the direction of the Court, find for the plaintiffs and assess their damages at the sum of $48,009.81 with interest thereon from January 7, 1921, R. P. Bunting, Foreman, this November 20, 1923." And thereupon it having been agreed by counsel for the parties respectively, as appears from their signed stipulation filed and made a part of the record in this action, that the net sum derived from the proceeds of the sale of the sugar in question is $7,019.13, and that the said sum came into the possession of the plaintiffs on October 28, 1921, pursuant to the terms of the agreement entered into between the plaintiffs, the defendant, and T. S. Southgate & Company filed and made a part of the record in this action, and that the defendant should be credited with said sum as of October 28, 1921, it is considered by the Court that the plaintiffs, Arthur H. Lamborn, Gerard P. Tameling, Charles C. Riggs, Henry B. Hutchins, Clarence C. Troup, Karl E. Lindgren, George H. Logan, Victor R. Hess, N. Nelson [fol. 8] Kenn, B. Wheeler Dyer and William V. Wood, partners trading and doing business as Lamborn and Com-

pany, do have and recover of and from the defendant, the National Bank of Commerce of Norfolk, a corporation, the sum of $48,009.81 with interest thereon at the rate of six percent from January 7, 1921, subject to a credit of $7,-019.13, as of, and with interest thereon at the rate of six percent from October 28, 1921, together with costs. And thereupon the defendant, by counsel, having intimated an intention to apply for a writ of error and supersedeas to the judgment aforesaid, leave is granted it to file its bill of exceptions within ninety days from this date, and the penalty of the supersedeas bond, if any, to be given on behalf of the defendant, is hereby fixed at the sum of Fifty Thousand Dollars ($50,000.00), the surety or sureties upon said bond to be approved by this Court or the Judge thereof.

D. Lawrence Groner, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ORDER FILING BILLS OF EXCEPTION—Filed February 11, 1924

This day came defendant by its attorney, and in pursuance of the leave heretofore granted it, tendered its bills of exception, which were received and considered by the Court and ordered to be made a part of the record.

D. Lawrence Groner, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

Bills of Exception—Filed February 11, 1924

CAPTION

Be it remembered, That upon the trial of the case the parties upon the part of each, respectively, to maintain the issues joined, introduced the following evidence, and the exhibits referred to therein and attached thereto, the originals of which said exhibits are to be by the Clerk of [fol. 9] this Court, pursuant to agreement between the parties, and in accordance with the rules and practice of

this Court and of the United States Circuit Court of Appeals for the Fourth Circuit, certified and sent to the said United States Circuit Court of Appeals for the Fourth Circuit at Richmond.

Evidence on Behalf of Plaintiff

The plaintiff offered in evidence the letter of credit dated May 11th, 1920, numbered 105, issued by the National Bank of Commerce to Lamborn & Company for the sum of $53,123.84, which was marked "Plaintiff's Exhibit No. 1", and is here copied, as follows:

Plaintiff's Exhibit 1

"The National Bank of Commerce of Norfolk, Norfolk, Virginia

Letter of Credit. No. 105

May 11, 1920.

Lamborn & Company, 132 Front St., New York:

We are establishing a credit in your favor through the Bankers Trust Company of New York under terms and conditions stipulated below.

Opened by T. S. Southgate & Company, Norfolk, Va., in favor of Lamborn & Company, 132 Front St., New York.

Amount: Fifty-three thousand one hundred twenty-three Dollars and eighty-four cents ($53,123.84).

Covering: 1,000 bags (of about 224 lbs. each) 10 percent more or less Java White Sugars at 22 cents per pound, [fol. 10] less 2% duty paid f. o. b. cars, Philadelphia, Pa., landed weights.

Documents: Sight draft with invoice and copy of Ocean Bill of lading covering shipment Java to Philadelphia, and Order Notify Bill of Lading attached.

Shipment: Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia.

Credit in force January 31, 1921.

This is to be regarded as an irrevocable credit. If impossible to comply with the conditions above stated, com-

municat*ion* with us before making shipment. The conditions embodied in this credit must be adhered to, otherwise payment will not be effected.

Yours very truly, A. E. Wharton, Ass't Cashier."
Cashier."

The plaintiff offered in evidence a modification of the letter of credit dated July 15th, 1920, as Plaintiff's Exhibit No. 27, which was then marked "Plaintiff's Exhibit No. 2", and is here copied as follows:

PLAINTIFF'S EXHIBIT 2

"The National Bank of Commerce of Norfolk, Norfolk, Virginia

Foreign Exchange Dpt.

July 15, 1920.

The Bankers Trust Co., New York City.

GENTLEMEN: We beg to revert to our letter of credit No. 105, dated May 11th in favor of Messrs. Lamborn & Co. [fol. 11] for $53,123.84, and to say that we have been authorized by our clients, Messrs. T. S. Southgate & Co. to eliminate the requirement of the copy of ocean bill of lading covering shipment from Java to Philadelphia. All other terms and conditions in the credit to remain as heretofore.

We will be pleased to have you advise Messrs. Lamborn & Co. that this requirement had been eliminated.

Yours very truly, A. E. Wharton, Ass't Cashier."

W/M.

The plaintiff offered in evidence a letter dated July 16th, 1920, from the Bankers Trust Company to Lamborn & Company as Plaintiff's Exhibit No. 28. This letter was marked "Plaintiff's Exhibit No. 3" and is here copied as follows:

PLAINTIFF'S EXHIBIT 3

"New York, July 16, 1920.

Messrs. Lamborn & Company, 132 Front Street, New York City.

GENTLEMEN: Re Credit No. 105 dated May 11th, in your favor, issued by National Bank of Commerce, Norfolk, Va.

We refer to your letters of June 10th and 15th on this subject and now advise you that we have received a letter from the National Bank of Commerce, Norfolk, Va., stating that they have been authorized by their clients, T. S. Southgate & Co., to eliminate the requirement of an ocean bill of lading showing shipment from Java to Philadelphia, of which please take note.

All other terms and conditions of this credit are to remain unchanged.

Very truly yours, C. F. Bain, Asst. Manager."

The plaintiff offered in evidence a letter of July 17th, [fol. 12] 1920, from National Bank of Commerce to Lamborn & Company, which was marked "Plaintiff's Exhibit No. 4" and is here copied as follows:

PLAINTIFF'S EXHIBIT 4

"Norfolk, Va., July 17, 1920.

Messrs. Lamborn & Co., New York City.

GENTLEMEN: Reverting to your letter of July 9th, we would advise that we have requested the Bankers Trust Co. of New York to eliminate requirement in our Credit No. 105 for copy of ocean bill of lading covering shipment from Java to Philadelphia. We have requested the Bankers Trust Co. of New York to notify you of the elimination of this requirement.

Yours very truly, A. E. Wharton, Ass't Cashier."

W/M.

It was stipulated between counsel that Mr. A. E. Wharton, Assistant Cashier of National Bank of Commerce had due authority to sign the above set forth letter of credit.

OFFERS IN EVIDENCE

The plaintiff offered in evidence the deposition of G. Alting du Cloux, together with a stipulation between counsel that in the taking of the testimony of this witness a photostatic copy of the bill of lading might be used, and also offered the original bill of lading, which bill of lading was marked "Plaintiff's Exhibit No. 6."

The plaintiff offered in evidence the photostatic copies of railroad bills of lading as "Plaintiff's Exhibit No. 7," which were dated December 17th, 1920.

[fol. 13] The deposition of G. ALTING DU CLOIX is as follows:

My name is G. Alting du Cloix. I am forty-two years of age and reside in Batavia, at Museumlaan 12. I am a partner of the firm of J. C. Van Rossen and Company, Steamship Agents in Batavia, Semarang and Soerabaya.

Shortly prior to and subsequent to September 30th, 1920, my place of residence was Batavia. I was employed by Francis Peek and Company, Limited, as Manager of the Shipping Department. I remember that in September, 1920, the Steamship "West Cheswald" was loaded by the Nederlandsch Maatschappij voor Overzeehandel, who were the shippers of certain sugar. I do not know who the consignee of the sugar was. The signature on the photostatic copy of an ocean bill of lading of the Steamship "West Cheswald," dated at Semarang, Java, September 30th, 1920, is my own. I signed that bill of lading on September 30th, 1920, at the instance of the shippers, on the authority that I had from Francis Peek and Company, Limited, to sign the bill of lading as Manager of the Shipping Department. It was signed on behalf of Francis Peek and Company, Limited, and I signed it in the name of Francis Peek and Company, Limited, as agents for the United States Shipping Board, Emergency Fleet Corpora-

tion, United American Lines, Incorporated, Successors to Independent Steamship Corporation, Agent.

I handed the original bill of lading over to the shippers against payment of freight and against letter of guarantee of the shippers according to which they promised to deliver to the steamship agents the mate's receipts signed by the captain of the Steamship "West Cheswald" as soon as those mate's receipts came to hand to them from Semarang. The captain signed the mate's receipts in Semarang as soon as the cargo was taken over. Those mate's receipts were handed to the shipper to send them to Batavia and deliver them to the steamship agents here in exchange for the bill of lading and the letter of guarantee.

The mate's receipts are receipts signed by the captain declaring having received on board the cargo mentioned therein.

During the time the "West Cheswald" was loading sugar [fol. 14] in Java, it happened that steamers arrived after the date specified in the contract of purchase between shippers and consignees, that is such steamers were to be loaded before a certain date. Bills of lading were given by the steamship agents, bearing a date of shipment falling within the shipping period stated in the contract of purchase. On account of a heavy fall in prices of sugar during the month of September, 1920, the purchasers endeavored wherever possible to cancel contracts and for that purpose investigated carefully the dates of departure of the steamers, but in the case of the "West Cheswald" the loading actually began, I believe, on the 28th of September, 1920. It is so long ago that I cannot remember the date exactly but the fact is loading was begun in time so that by greatest effort and by loading at night, the loading of the cargo in question was completed on September 30th, 1920."

Counsel for the plaintiff then offered in evidence those portions of the following depositions relating to the S/S "West Cheswald" and her cargo.

WILLIAM H. LIGNANTE, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. Van Doren:

My full name is William H. Lignante. I am twenty-nine years old and reside at 15 Bay 17th Street, Brooklyn, New York.

I am Sugar Traffic Manager of Lamborn & Company, New York. I have been employed in that capacity for about three years and was so employed in the summer and fall of 1920. As Traffic Manager, in the fall of 1920, when we had notice that a vessel would carry certain quantities of sugar aboard, we would apportion the sugars to the various buyers according to declarations made, and cause to have made up the railroad bills of lading covering these shipments, and proceed to the port or ports where the ships came in and see to it that the duties were paid thereon, and then proceed to the pier to observe the discharge of the sugars and see to the [fol. 15] placing of the various shipments on board cars, and see to the signing and delivery to us of the various railroad bills of lading for the various shipments.

I remember the arrival of the Steamship "West Cheswald." She arrived in this country on December 16th, 1920, and entered at Philadelphia. That was the port of her original entry on the voyage in question. I saw the unloading of that part of the cargo of the "West Cheswald" which was consigned to Lamborn and Company, with the exception of about 800 bags. I saw it at Pier 56, South Philadelphia. I got to the Pier about two hours after the arrival of the ship. She had unloaded about 800 bags of Lamborn & Company's shipment before I got to the Pier. Altogether she carried for Lamborn & Company 34,666 bags. I stood by and supervised the sugars as they were coming out of the hold of the West Cheswald and delivered to the stevedores on the pier, who in turn turned them into the railroad cars. These railroad cars were ordered into the pier by me, weighed light in order to avoid delay in shipment, and facilitate the weighing of the sugars, and sugars were being checked out by our men on the pier, our weigher and sampler, who obtained samples of the sugars as they were being loaded into the railroad cars.

The railroad cars were then checked back again by the railroad company, sealed by the railroad company and drawn out on the railroad track scales. There the cars were weighed by the United States Government Weigher, railroad weigher and our private weigher, to obtain the landed weights. Then I obtained the railroad bills of landing and forwarded them on to the New York office for the various shipments.

I have been superintending the unloading and shipment of Java White sugar for Lamborn & Company for about a year. During that time I have handled approximately 30,000 tons in the course of my employment. Samples of cargoes of Java white sugar are taken by Lamborn & Company and they were so taken of the cargoes that I have referred to in my preceding answers. In no case was the taking of such samples omitted. I made a personal examination of the quality of the sugar in the aggregate amount of shipments that I referred to, and in the course of my employment became familiar with the quality and [fol. 16] grade of Java White Sugar. Samples were taken of the Java White Sugar consigned to Lamborn & Company, carried by the West Cheswald. I saw those samples and was present when they were actually taken from the bags. I examined the sugar which was taken out for the samples, and the sugar carried by the West Cheswald consigned to Lamborn & Company was a very good grade of Java White Sugar above the best Dutch standard 25. The bags and their contents were in good physical condition.

Robert A. Wabrauschek, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. Van Doren:

My name is Robert A. Wabrauschek, aged twenty-two, occupation, chief clerk of the Admiral Line, Pacific Steamship Company, New York City, Office, 17 State Street; residence, 13 Charles Street, New York City.

(Note.—Counsel hands witness paper, which he states he is familiar with and is marked "Plaintiff's Exhibit 8 for identification.)

I entered the employment of the Admiral Steamship Company September 1919. Originally I was clerk in the dock offices in Seattle, and cashier on another dock, and then I was transferred here as chief clerk.

I know that Francis Peek & Company, Limited, are a firm of ships' agents operating in Semarang, Batavia and Soerabaya, and they have acted for some of our steamers as ships' agents. They wouldn't really be steamers of the Admiral Line proper. They would be steamers of the Barbour Steamship Lines. We acted as their Pacific agent and they have been handling the Barbour Steamship steamers in the Far East. We also acted as agents for Tracy Steamship Company. They don't oridinarily have steamers in that trade, but in this case of the West Cheswald we acted as agents for the Tracy Steamship Company, that is, the Admiral Line did, and we acted in that capacity in connection with the Steamship West Cheswald. [fol. 17] It appears that the Shanghai office of the Admiral Line employed Francis Peek & Company to act as steamer agents of the West Cheswald. It is a fact that the Admiral Line was the agent for Tracy & Company in respect to the West Cheswald.

On and after September, 1920, I was acting as an employee of the Admiral Line at 17 State Street, New York City. Hugh Gallagher was our general Eastern agent in New York at that time and if there were any communications regarding the Steamship West Cheswald after September 30th, 1920, they passed through his hands.

I have here from the files of the Admiral Line communications regarding the said Steamship.

(The witness produces a copy of cablegram dated at Seattle, October 18th, 1920, a copy of which has been made and compared by the notary taking this deposition, and it is attached to this deposition and marked "Plaintiff's Exhibit 9 for identification.")

(Witness also produces a copy of a letter, dated at Shanghai, September 11th, 1920, addressed to E. F. Townsend, Agent, Admiral Line, purporting to be signed by G. A. Heyburn, Assistant Manager, a copy of which has been made and compared by the Notary taking this deposition and is attached to this deposition and marked "Plaintiff's Exhibit 10 for identification.")

The copy of the cablegram bears a stamp "Pacific Steamship Co., October 25th, 1920, time New York Office." That stamp is used in the New York office of the Admiral Line. The Pacific Steamship Company is the corporate name, while the Admiral Line is the trade name under which we operate. They are the same thing.

The date in this stamped notation on said Exhibit indicates that the cablegram referred to was received in the New York office of the Admiral Line on October 25th, 1920. This is the very copy that was received.

[fol. 18] PLAINTIFF'S EX. 9 FOR IDENTIFICATION

Feb. 10/1922HCD

(Copy)

"Form 2294-3.15.1920. 3M

For Your Information
Translation of Cablegram from the Admiral Line

Pacific Steamship Co. Oct. 25, 1920, time filed.
P. S. S. Co.
Pacific Steamship Company, New York Office.
Signed by: Admiral Line.
Place and Date: Seattle, October 18, 1920.
Addressed to: Admiral Line, Shanghai.
Copies to: R.D.P.—Action H. G. Information.
No. 257, 18th October.

X West Cheswald:

Referring to your telegram 15th October Barber S S Lines Inc regarding Francis Peek & Co. appointing agents Colombo steamer left in your hands instruct Peek all matters."

I know that signature on the letter dated Seattle, October 6th, 1920, addressed to Mr. E. J. Griffith. It reads R. D. Pinneo. It is not his personal signature but was signed [fol. 19] by Mr. Eaton. Mr. Eaton was Mr. Pinneo's as-

sistant. I have met Mr. Pinneo but I did not know Mr. Eaton. The letter has a stamp or receipt by the Pacific Steamship Company, dated October 12th, 1920 (a copy is made by the Notary and attached to this deposition marked "Plaintiff's Exhibit 11" for identification, reading as follows):

"PLAINTIFF'S EXHIBIT 11 FOR IDENTIFICATION—Feb. 10, 1922. H. C. T.

The Admiral Line Foreign Department Pacific Steamship Co.

Oct. 12, 1920, New York Office. Seattle, Wash., Oct. 6, 1920.

Mr. E. J. Griffith, Asst. Gen. Eastern Agt., New York, N. Y.

DEAR SIR:

S. S. "West Cheswald"

Referring to your telegram of day or two ago, inquiring with reference to the West Cheswald:

I enclose copy of letter of September 11 from Mr. Heyburn to Mr. Townsend, which has just been received here, showing that this steamer left Shanghai September 11 for Samarang, Java, evidently to load for Europe.

As I wired you, I was under the impression that this ship had been substituted for a Barbour ship to take the Java-European berth, having noted some telegrams exchanged between Shanghai and Barbours to this effect. I presumed, of course, that Barbours had made this arrangement with Tracy & Co. and that Tracy & Co. were fully advised as to the movement of their steamer.

I shall be interested to learn what you have developed since you discussed the matter with the Barbour Line.

Yours very truly, R. D. Pinneo, Manager Foreign Department."

E/R.

[fol. 20] The letter offered in evidence (Exhibit 11 for identification) shows as having attached to it a letter dated September 11th, 1920, Shanghai, which I now find attached in the file, reading as follows:

"PLAINTIFF'S EXHIBIT 10 FOR IDENTIFICATION—Feb. 10, 1922. H. C. T.

Shanghai, September 11, 1920.

Mr. E. F. Townsend, Agent Admiral Line, c/o Syme & Co., Singapore.

DEAR SIR:

S. S. "West Cheswald"

This steamer is leaving Shanghai today for Samarang and we enclose herewith a list of Charts required by the Master for his voyage to Europe.

Will you please obtain these Charts promptly and communicate with Messrs. Francis Peek & Company and find out position of vessel and where it is possible to send these Charts to him so that they will safely arrive.

This is an eleventh hour fixture although the "West Cheswald" was scheduled some three weeks ago to go to Java. Francis Peek at the last minute cabled us to fix her elsewhere if possible and we have been communication with Barber Steamship Lines and Francis Peek & Company with result that we received an urgent cable yesterday to send steamer to Java.

Please do all possible to assist the Captain in obtaining these Charts.

Yours truly, (Sg.) G. A. Heyburn, Assistant General Agent."

GAH/AFH.

[fol. 21] FRANCIS C. GAWEL, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. Van Doren:

My age is twenty-seven years. I live in Richmond Hill, Long Island, and I am a clerk for M. H. Tracy & Company, Incorporated, which Company is also known as the Tracy Steamship Company. I have been in their employment approximately three years. I was in the United States Service during the war and returned to their employment in August, 1919, and have been in their employment

without interruption since that time, with the exception of three or four months from June to October, 1921, at which time I was loaned by them to another transportation concern.

During September, October, November and December, 1920 I was acquainted with Pacific Steamship Company, whose trade name I believe is the Admiral Line.

The Tracy Steamship Company were the agents for the Steamship "West Cheswald" and as a part of my duties I had certain functions to perform for that steamship. The Tracy Steamship Company were the agents for the Shipping Board at New York. They appointed other agents in respect to the "West Cheswald", namely the Admiral Line on the West Coast and in the Far East.

The Tracy Steamship Company knew that the Admiral Line had appointed Francis Peek & Company, Limited the agents for this steamship in the Far East.

I have seen the copy of the ocean bill of lading which yau hand me marked "Plaintiff's Exhibit 8 for identification." It is an ocean bill of lading for the "West Cheswald", in the name of Francis Peek & Company, Limited, Agents. I cannot read the name in handwriting beneath the stamped name of Francis Peek & Company, Limited. Our company has had communication with Francis Peek & Company through the Admiral Line, but I have never seen other shipping documents stamped Francis Peek & Company, like the one before me.

(NOTE.—Witness here produces a non-negotiable copy of "Plaintiffs' Exhibit 8" for identification of this date, [fol. 22] and the paper produced by the witness is marked "Plaintiffs' Exhibit 12 for identification." It is ruled that a photographic copy of said Exhibit 12 be attached to this deposition in place of the original.)

I obtained this Plaintiffs' Exhibit 12 for identification from our agents, Charles T. Megee Company, Drexel Bldg., Philadelphia, Pa. It is a non-negotiable copy of an ocean bill of lading.

I had a telephone conversation with Mr. B. W. Dyer, a member of the firm of Lamborn & Company, concerning the Steamship "West Cheswald," Mr. Dyer asking me whether we would consider sending the West Cheswald to Philadelphia instead of New York. I told him, as far as

I can remember, that it would all depend on how Lamborn & Company's sugar was stowed, and to obtain this information I radioed the Master at his request. The radiogram read as follows: "New York, December 11, 1920, 12:30 P. M. Master steamer West Cheswald. Radio immediately amount general and sugar aboard how stowed and if sugar Lamborn can be discharged without moving other cargo." He replied as follows: "December 11, 5:35 P. M., 1920, 2,700 tons general cargo Nos. 1, 2, 4, 5 hatches including 1,100 tons sugar marked SZK optional Delaware Breakwater for which has no manifest bills of lading neither for cargo loaded at Sourabaya Lamborn sugar available without moving other cargo and must be discharged first ship due about December 14, A. M."

The words "1,100 tons marked SZK, optional Delaware Breakwater for which has no manifest bills of lading neither for cargo loaded at Surabaya" in the Captain's radiogram do not refer to the 34,666 bags of sugar on the West Cheswald consigned to Lamborn & Company. I do not know the approximate place on the high seas of the West Cheswald at the time of the sending by the Captain of the above radiogram, but according to the radiogram it was via Bermuda and Barrington Pass. I believe a radio message on board of one of these steamers of the size of the West Cheswald can be sent for a distance of approximately 500 miles. Our message had been directed by wireless by way of Punta Delgada Azores. I do not know whether or not the West Cheswald was [fol. 23] making the southerly route and I have not learned. Unofficially the fact that the reply came from Bermuda and the message was sent by the Azores would indicate that she was. Whether or not sugar ships from Java took the southerly course was entirely in the discretion of the master. It was necessary for them to stop at coaling stations to replenish their bunkers. Of course it all depends on how much cargo she has on board and how much bunker she can take. If the cargo is very small she could undoubtedly bunker at Java and proceed direct to a United States port without rebunkering, by going West through the Indian Ocean, Suez Canal, Red Sea, Mediterranean and by Gibraltar. The customary route of these ships is by Gibraltar because the distance is shorter.

I have not learned the distance from the Atlantic Coast that the West Cheswald was at the time of our radiogram. Our next step after receiving the Captain's radiogram was an immediate communication with United States Shipping Board by telephone. I told the Shipping Board the contents of the Captain's radiogram, and asked if they would consider sending the West Cheswald to Philadelphia instead of New York. They authorized me to divert this steamer to Philadelphia at an additional freight charge of $1.00, which charge was to be made against Lamborn & Company. By telephone I communicated with Lamborn & Company, talking to a man who gave his name as Mr. Dyer. He said that he would consult with his company and let me know. Afterwards he telephoned me and said to go ahead and divert the steamer to Philadelphia, that his company was agreeable to paying the extra $1.00 per ton freight. He subsequently confirmed this by letter reading as follows:

"New York, December 13, 1920.

Lamborn & Company, 132 Front Street; Tracy Steamship Company, 17 State Street, New York City.

GENTLEMEN: Confirming telephone conversation of this afternoon with Mr. Gawell in reference to our conversation with Mr. Sinclair of the Shipping Board, we herewith authorize you to divert the SS. West Cheswald to Phila- [fol. 24] delphia and advise you that on account of such diversion we agree to pay $1.00 per ton bill of lading weight excess freight on the quantity of about 3,572 tons of Java White Sugar, which are coming to us on this boat.

This letter is written in duplicate and your acceptance of the attached copy constitutes our agreement.

Thanking you for your cooperation in this matter, we beg to remain,

Yours very truly, Lamborn & Company. (Signed) B. W. Dyer."

Upon receipt of this confirmation I immediately radioed the master as follows:

"New York, December 13th, 1920.

Master Steamer West Cheswald, from Punta Delgada, December 3, via New York Radio:

Proceed Philadelphia reporting Megee acknowledge Tracio."

He replied as follows:

"Steamship West Cheswald, via Pt. New York, December 14, 1920; Tracio, New York:

West Cheswald proceeding Phidalephia as per instructions Master."

I note from the rear side of the radiogram received that it gives two hours as its time of receipt on December 14th as follows: "December 14 A. M. 2:10; December 14 A. M. 3:17."

I do not know on what date the West Cheswald docked at Philadelphia, but we received a further radiogram from the master while en route there reading as follows:

"Dated December 15, 12:17 P. M. SS. West Cheswald via United States Philadelphia Penn. 15 Tracio New York. West Cheswald arrived Delaware Breakwater midnight. Master."

[fol. 25] The average speed of the steamer on this voyage was about nine knots. I would say that taking into consideration the dates of the radiograms, the fact that he was proceeding to Philadelphia, and his average speed the diversion of the ship to the Port of Philadephia did not delay her arrival and docking.

I rendered a bill to Lamborn & Company for the additional freight charges reading as follows:

"New York, December 16th, 1920.

Lamborn & Company, New York, to M. H. Tracy & Company, Inc., Debtor

West Cheswald No. 1

Extra freight due on account of diverting above steamer from New York to Philadelphia as per your letter of agreement dated December 13th, 1920, 3,572 tons of sugar (Java) at $1.00 per ton, $3,572.00."

I also sent a letter with this invoice as follows:

"December 16th, 1920.

Messrs. Lamborn & Company, New York City.

Attention Mr. Dyer. SS. West Cheswald

GENTLEMEN: We enclose herewith our invoice covering extra freight due the above steamer on account of diversion from New York to Philadephia.

Will you kindly let us have your check to cover and much oblige.

Very truly yours, Tracy Steamship Company, Inc., per Francis C. Gawel.

(By hand.)"

The amount of this invoice was paid to Tracy Steamship Company by Lamborn & Company on or about December 16th, 1920.

[fol. 26] JAMES LUTZ, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. McNevin:

I am a sugar weigher employed by George J. Hoffman & Company, and I reside at 1711 East Moyamensing Ave., Philadelphia.

I have been a sugar weigher for about fifteen years, and in my present employment for about four years. My office is 80 Wall Street, New York City, although I am now stationed in Philadelphia. I was in Philadelphia in the month of December 1920 and know of the plaintiff Lam-

born & Company and of Mr. William H. Lignante. I saw the Steamship "West Cheswald" there at Pier 56 South Wharves. Her cargo consisted of white sugar, at that time on Pier 56 and coming from the ship. We weighed the bags as they came out. Mr. Hamann from Hoffman & Company and myself weighed nearly the whole cargo.

On the 17th of December, 1920, we weighed a lot of 1000 bags for T. S. Southgate & Company. The only orders that we received were to weigh 1000 bags for them. On Mr. Lignante's orders we did the weighing on the railroad scales which were about two blocks away from the pier. The bags were marked N M V O. A United States Government Officer and the railroad weigher assisted us. We weighed the whole car at one time. That is, we light weighed the car first, then we loaded it with sugar, then weighed it again and deducted the tare, that is, the weight of the car from the gross weight, and then deducted the tare of the bags.

The only record I made of the weighing of the 1000 bags for T. S. Southgate & Company is contained in this book.

(The book is marked for identification Plaintiff's Exhibit 13.)

The page headed "T. S. Southgate & Company, Norfolk, Va." is in my handwriting and those figures represent 1000 bags and represent the weight of 1000 bags of Java white sugar weighed by us for T. S. Southgate & Company on December 17th, 1920. They show the gross weight, [fol. 27] but not the net weight. It shows the net weight of the bags but not the net weight of the sugar. The net weight of the sugar weighed for T. S. Southgate & Company was 222,680 lbs. and that was the correct weight taken by Mr. Hamann and myself. I saw it all taken. We took 5% of the 1000 bags, that is fifty bags to arrive at the tare for the load. We obtained the tare by dumping the bags on the pier and then shovelling up the sugar and putting it back again after we tared the bags. I saw the sugar loaded into railroad cars T. & N. O. 331,041, 330 bags; M. St. P. & S. M. 36470, 335 bags and C. R. I. & P. 40979, 335 bags. Afterwards I made the entry of the weights on the book. I gave the book to Mr. Hamann and I have not seen it until this morning when Mr. Hurley of George J.

Hoffman's office gave it me. All of the handwriting headed "T. S. Southgate" on the page in the book marked "Plaintiff's Exhibit 13, April 10th, 1922," above the words "tare 2.60" and all the figures on the page are in my handwriting. Those entries were made on December 17th, 1920, just as I entered the weights. The words "tare 2.60" are in Mr. Hamann's writing.

(NOTE.—Plaintiff's Exhibit 13 offered in evidence photograph copy of that page to be attached to this deposition, and original produced at the trial.)

JOHN BOHAN, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. McNevin:

My residence is 110 Sussex Street, Jersey City, N. J., and I am employed by Lamborn & Company as a sugar sampler, 132 Front Street, New York City. I have been in their employ for about eight years and had been engaged in sampling Java white sugar for about two years previous to December 20th, 1920. Up to that time I had examined about 200,000 bags. In December 1920 I was in Philadelphia, sampling the Java white sugar from the Steamship West Cheswald at Pier 56, South Wharves, Philadelphia, Penn. I sampled during that month 1,000 bags for T. [fol. 28] S. Southgate & Company, the work being done on the 17th of December, 1920, on the pier while the sugar was going into railroad cars, the cars being marked "Southgate & Company." Mr. Nolan and Mr. Teehan assisted me in sampling the 1,000 bag lot for T. S. Southgate & Company. Each of us sampled a car, that is sampled the sugar going into the car, there being three cars loaded with the Southgate lot. I mixed all of the samples. We had a sort of gimlet that we put into a bag, drew a sample of sugar out of each bag, put it into a large paper bag, and when the job was finished the sugar was taken and mixed and two tins of about one pound each shipped to New York. I took a sample out of each bag that went

into the car that I was working on and mixed all of the samples together. The samples from all three cars were mixed together and this mixture from the 1,000 bags was shipped to New York, parcel post. They were put into two tins and both tins had the same quality of sugar. The sugar was found to be in good condition. It was Java white sugar above the Dutch Standard 25. The bags were perfectly dry.

The tin that you show me is one of the tins into which we put a sample of the sugar taken from the 1,000 bag lot for Southgate & Company and the label on that tin is in my handwriting.

(Plaintiff's Exhibit 14 for identification.)

I mailed that tin to Lamborn & Company, New York and have not seen it until this morning in Mr. Van Doren's office where it was handed me by Mr. Nelson Keen, one of the plaintiffs.

This is a report that I made of the quality and condition of the sugar sampled for T. S. Southgate & Company.

(Marked Plaintiffs' Exhibit 15 for identification.)

It is my signature on the report, the last one over the word 'sampler.'' The words ''Sound—all'' apply to the condition of the bags of sugar of T. S. Southgate & Company, as *due* the words ''damaged—none.'' I was in Philadelphia in February, 1921, sampling sugar from the Steamship ''Chifuku Maru'' and sampled a cargo of sugar on that ship consigned to Lamborn & Company. All that [fol. 29] sugar was in good condition, Java white sugar above the Dutch Standard 25.

At that time I had been sampling Java white sugar for about two years and had sampled over 200,000 bags. I think I sampled about 40,000 bags of Java white sugar on the Steamship ''Chifuku Maru''. The sugar on that ship was of about the same quality as the sugar on the ''West Cheswald''.

JOHN TEEHAN, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. McNevin:

I live at 329 Bergen Street, Brooklyn, and am employed by George J. Hoffman & Company as a sugar sampler, in which capacity I have been employed for about seven years.

Up to January 1st 1921, I had sampled approximately 100,000 bags of Java white sugar. In December, 1920 I was in Philadelphia working for Lamborn & Company on a cargo of Java white sugar which came to Philadelphia on the Steamship "West Cheswald" and was at Pier 56 South Wharves. On December 17, 1920, at that time and place I was sampling bags of white sugar for T. S. Southgate & Company. I sampled all of the bags that went into one railroad car marked "T. S. Southgate & Company, Norfolk, Va." I do not remember the number of the car. I took a sample of sugar from each bag with a tryer while the bags were going into the car, put the samples in a bag and turned the bag over to Mr. Bohan. Mr. Bohan mixed them up together with the samples that he and Mr. Noland had drawn from the other bags that were going into the cars of T. S. Southgate & Company, and then he put a portion of that mixture in two cans, sealed them up and shipped them to Lamborn & Company, New York.

Plaintiffs' Exhibit 14 for identification is one of the cans that Mr. Bohan put some of the samples into and shipped to New York. I last saw it at Pier 56, South Wharf, Philadelphia, Pa., at which time it was sealed around the top.

From my examination of the quality of sugar in the [fol. 30] 330 bags that I sampled I would say that it was all free running Java white sugar in good condition, above the Dutch Standard 25. The bags were in good condition, marked N. M. V. O. Java.

JOHN F. NOLAN, being duly sworn and examined as a witness for the plaintiffs, testified as follows:

By Mr. McNevin:

I am employed by George J. Hoffman & Company, 80 Wall Street, New York, and have been employed by them for the past ten years as a sugar sampler, licensed by the New York Coffee & Sugar Exchange, New York. Up to January 1st, 1921, I had sampled from 200,000 to 300,000 bag of Java white sugar and am familiar with the grades and varieties of Java white sugar.

In December, 1920 I was in New York and Philadelphia and when in Philadelphia I was at Pier 56, South Wharves, sampling a cargo of sugar from the Steamship West Cheswald. I was sent thereby Mr. Hoffman to sample sugar for Lamborn & Company going to different consignees. I sampled the sugar on the dock going into the car marked "T. S. Southgate & Company, Norfolk, Va." I sampled about 330 or 335 bags, that is, one railroad carload. By drawing a tryer full of sugar from each bag, comparing this with the Dutch Standard 25 which we had, I saw that it went above the Dutch Standard, and I put the sugar in a bag and turned the bag over to Mr. Bohan. The bags were marked "N M V O Java."

Mr. Bohan emptied the bags upon a mixing table with the sugar which he and Mr. Teehan had drawn from bags which were going to T. S. Southgate & Co. and mixed it thoroughly. He then put a portion of the sugar into two tins which he labeled and sealed.

Plaintiffs' Exhibit No. 14 for identification is one of the cans into which Mr. Bohan put part of the sugar which he mixed. I last saw that can on December 17th, 1920, at Pier 56, Philadelphia, at which time it was full and sealed around the top. It is now not full and unsealed. At the time that I sampled the sugar going to T. S. Southgate & Company from the Steamship West Cheswald at Phila-
[fol. 31] delphia, it was all above the Dutch Standard 25 and the bags were in good condition, all free running white Java sugar."

WILLIAM O'NEIL, being duly sworn, and examined as a witness for the plaintiff, testified as follows:

By Mr. McNevin:

I live at 9 Gates Avenue, Brooklyn, and am employed by Lamborn & Company and have been employed by them as a sample room clerk and in different positions for over three years.

In December, 1920, I was a clerk in charge of the sample room of Lamborn & Company. The can marked "Plaintiffs' Exhibit 14 for identification" was received about December 20th, 1920. I took a sample of the sugar out and filled a sample bottle with it and sealed the bottle and put a label on it, the same label that was on here (indicating Plaintiffs' Exhibit 14 for identification). When I received the can it was sealed around the top with paper and I broke the same.

The bottle here is the one that I filled from the can marked 'Plaintiffs' Exhibit 14 for identification.' I wrote the label on the bottle marked 'S S West Cheswald N M V O Java sample one of 1,000, total 1,000 bags T. S. Southgate Company, Lamborn & Company, Pier 56, Philadelphia, Pa.', the date '12/17/20'.

I sealed the bottle and locked it up in the sample room of Lamborn & Company from which it was brought today. I filled the bottle about December 20th, 1920, and dated the label December 17th, 1920, representing the date sample was taken."

FREDERICK A. HAMANN, being duly sworn and examined as a witness for the plaintiffs, testified as follows:

By Mr. McNevin:

My residence is 7025 Third Avenue, Brooklyn. I have been employed by George J. Hoffman & Company, 80 Wall Street, New York City for about fifteen years. I am the Philadelphia representative and sugar weigher in charge of the Philadelphia office. I was in charge of the [fol. 32] Philadelphia office in December, 1920, and was

general overseer of the weighing of the cargo of the West Cheswald.

The words "tare 2.60" on page marked "Plaintiffs' Exhibit 13 for identification" of April 10, 1922 are in my handwriting, as are the words "December 17th" at the bottom of the page. The words "tare 2.60" represent the tare of each individual bag, that is the weight of the empty bags. I worked with James Lutz in taking the tare of that shipment. We dumped one bag into another until we obtained the full quota of 50 bags which represented 5% tare of 1,000 bags. The 50 bags were weighed and the weight of same designated the tare of 1,000 bags. The fifty bags were weighed together, the weight being divided by 50, giving a tare of 2.60 per bag.

The words "Dec. 17th", represent the date of weighing, and the words written on that page "tare 2.60" and "Dec. 17th", were written on December 17th, 1920, and the book was given to me on that date and mailed to George J. Hoffman & Company, 80 Wall Street, New York City. I have not seen the book since that time until today.

WILLIAM H. LIGNANTE, being recalled on behalf of the plaintiffs, testified as follows:

By Mr. McNevin:

In December, 1920, I was employed by Lamborn & Company as Traffic Manager of the sugar department and during that month was both in New York and Philadelphia. On December 17th or about that date I was in Philadelphia where I ordered our weighers to weigh out 1,000 bags of sugar and have them loaded in cars at the pier for T. S. Southgate & Company's account. The weighers were George J. Hoffman & Company, their representatives being Fred Hamann and James Lutz. I saw to it that the 1,000 bags were property loaded into the railroad cars designated for the T. S. Southgate & Company shipment and saw to it that the check for the number of bags in each car was correct, and also observed Mr. Hayes of the Pennsylvania Railroad Company sealing the cars. The T. S. [fol. 33] Southgate & Company shipment was loaded into

the cars C. R. I. & P. No. 979; Soo Line 36470, T. & N. O. 31041, a total of 1,000 bags. The bags were loaded into the cars, 335, 335 and 330 respectively. The Soo Line is known as the "Minneapolis, St. Paul and Sault Ste. Marie." The cars were right at the pier at which the West Cheswald docked and the sugar came from the West Cheswald. Assuming that the Plaintiffs' Exhibit 16 for identification, comprising two sheets, constitutes a correct photographic copy of the railroad bill of lading on this shipment, I saw the original bill of lading when it was signed by the railroad company on December 17th, 1920, by Mr. Hayes at Washington Avenue Wharfs, at Philadelphia, Pa. That is his signature on the railroad bill of lading. He turned the bill of lading over to me and I forwarded it on to our New York office by mail, addressed to Lamborn & Company, 132 Front Street, New York City, attention Mr. Smith. The bill of lading is signed by the Pennsylvania Railroad Company by Mr. Hayes as superintendent of Pier 56, South Wharfs, Philadelphia.

The cars left the pier on December 17th, 1920.

JOSEPH A. BROWER, being introduced as a witness for the plaintiff and duly sworn, testified as follows:

By Mr. McNevin:

I reside at Rockville Center, L. I., and am twenty-five years old and employed by Lamborn & Company, and have been for nearly three years, and was in December, 1920, in the capacity of assistant in the Credit Department preparing documents. The copy of the letter dated December 23rd, 1920, that you hand me, is a copy of an original letter dictated by me and subsequently signed by a member of the firm of Lamborn & Company, Mr. Keen, attached to certain documents and sent to Bankers Trust Company. That copy was returned to the files. The copy marked "Plaintiffs' Exhibit 17 for identification" was attached with the original and went with the papers to the Bank.

The words "Received original, Bankers Trust Co., New York City, C B" represent receipt of the original letter. [fol. 34] The letters "C B" were not on the letter when it left me and I do not know what they represent.

The paper which you show me is the sight draft of Lamborn & Company drawn on the Bankers Trust Company of New York to the order of themselves for the account of T. S. Southgate & Company, Norfolk, Va., against the National Bank of Commerce, Norfolk, Va., Letter of Credit 105. I caused that paper to be prepared and the signature "Lamborn & Company" thereon is Mr. Keen's. The signature was on the paper before it was presented to the Bankers Trust Company. The words in red ink "January 7th, 1921, protested for non-payment Joseph N. Lomedico Notary Public," were not on the document when it was presented for signature, nor was the signature "Lamborn & Company." Except in those particulars the document when presented to Mr. Keen was as it appears now. The signature "Lamborn & Company" on the back of the Plaintiff's Exhibit 18 for identification is the signature of Mr. Keen, and was on it before the exhibit was presented to the Bankers Trust Company.

The paper marked "Plaintiffs' Exhibit 19 for identification" was received from George J. Hoffman & Company and is a weight certificate. Plaintiffs' Exhibits 20 and 20A for identification are invoices of Lamborn & Company in duplicate for 1,000 bags of Java white sugar sold to T. S. Southgate & Company, Norfolk, Virginia, dated December 20th, 1920, net weight of 222,680 pounds, shipped in cars C. R. I. & P. 40979, 335 bags; Soo Line 36470, 335 bags; T. & N. O. 31041, 330 bags. I caused those documents to be prepared on or about December 20th, 1920.

Assuming that Plaintiffs' Exhibit 16 for identification is admissible, the two sheets constitute together a correct photographic copy of the railroad bill of lading on that shipment, I had the original bill of lading after December 20th, 1920, that is on December 24th.

Plaintiffs' Exhibit 21 for identification is a letter certifying that the ocean bill of lading of the steamship West Cheswald is on file in Lamborn's office and is dated "Samarang Java, September 30th, 1920." The words "Lamborn & Company, N. Nelson Keen" are Mr. Keen's signature and was made on December 23rd, 1920.

[fol. 35] I caused the document to be prepared and the words "Joseph N. Lomedico" are the signature of Joseph N. Lomedico. The writing on the face of Plaintiffs' Exhibit 22 for identification was done by me and the paper

was prepared on December 24th, 1920, at which time I had the original bill of lading with me. With it at that time were Plaintiffs' Exhibit 17 for identification and the originals of Plaintiffs' Exhibits 18, 19, 20, 20A, 21 and 22 for identification.

The words on the back of Plaintiffs' Exhibit 22 for identification "Bankers Trust Company, New York City, W. J. Kenny," were not thereon when I had the paper in my possession on December 24th, 1920. I gave these papers to a messenger of Lamborn & Company, Mr. Lynch, with instructions to deliver these documents to Bankers Trust Company, Letter of Credit Department and bring back with him a receipt, also a receipt for the original letter dated December 23rd, 1920—the original of Plaintiff's Exhibit 17 for identification—and to ask them what time we could call back for the check. Later on December 24th, Mr. Lynch gave me a receipt and a receipted copy of the letter of December 23rd. Those receipts are Plaintiffs' Exhibits 22 and 17 for identification. I asked him what time the check would be ready and he said he was told to call back in the afternoon. In addition to these documents I gave Mr. Lynch a photostatic copy of the bill of lading of the steamship West Cheswald, and told him to deliver the documents to Mr. Kenny of the Bankers Trust Company. I asked him if he had the check and if he brought back photostatic copy of the steamship bill of lading, and he gave me the photostatic copy of the bill of lading and told me the check wasn't ready. That conversation was on December 24th, 1920, in the office of Lamborn & Company.

JOSEPH LYNCH, being introduced as a witness for the plaintiff and being duly sworn, testified as follows:

By Mr. McNevin:

I live at 108 Magnolia Avenue, Jersey City, N. J., and have been employed by Lamborn & Company for about [fol. 36] two years as a messenger in the Credit Department, in which capacity I was employed in December, 1920.

The original bill of lading and the photographic copy of railroad bill of lading, marked "Plaintiffs' Exhibit 16

for identification," was attached to the documents that I presented to the Bankers Trust Company on December 24th, and received by me from Mr. Brower, together with the original of a letter dated December 23rd, 1920, to the Bankers Trust Company signed by Mr. Keen. I also received on that date from Mr. Brower Plaintiffs' Exhibit 17 for identification. The words now on that letter "Received original, Bankers Trust Company, New York City, C. B." were not on the letter at that time. Plaintiffs' Exhibit 22 for identification is one of the papers that I received from Mr. Brower on December 24th, 1920, together with a sight draft on ourselves, dated December 20, 1921, for $48,009.81. That is the one marked "Plaintiffs' Exhibit 18 for identification," at which time it had the writing on the back of it "Lamborn & Company." The words on the face of it "January 7, 1921, protested for non-payment Joseph N. Lomedico, Notary Public" were not on it when received by me on December 24th.

Plaintiffs' Exhibit 19 for identification was received by me on December 24th, together with Plaintiffs' Exhibits 20 and 20A for identification, and Plaintiffs' Exhibit 21 for identification. I presented all of these to the Bankers Trust Company, Letter of Credit Department, 14 Wall Street, and saw there a clerk in the Letter of Credit Department, who was at the window. I gave him the papers. He took them to Mr. Kenny, who, I believe, is in charge of the Letter of Credit Department. I saw Mr. Kenny there at that time, but did not see what he did with the papers. I received back on the same date a receipt of Lamborn & Company stamped by the Bankers Trust Company and signed by W. J. Kenny. That is Plaintiffs' Exhibit which is marked 22 for identification. On the back of the receipt are the words "Bankers Trust Company, New York City, W. J. Kenny." A receipt was given me by the man at the window to whom I gave the documents. I also received back the letter of December 23rd, 1920. That is Plaintiffs' Exhibit 17 for identification. At that time it [fol. 37] had on the back "Received original, Bankers Trust Company, New York City, C. B." The only conversation I had with the clerk to whom I handed these papers was with reference to what time I should come back for a check and he told me to call back later in the day. I went back later in the day and saw Mr. Kenny and had

a conversation with the Clerk at the Letter of Credit Department and handed him a photostatic copy of the bill of lading of the Steamship West Cheswald and asked him to see that it was delivered to Mr. Kenny and he said he would like to see it. I did not hand him anything else and I waited in the Bankers Trust Company for about three hours before I got the bill of lading back. It was given me by a clerk in the Letter of Credit Department and I did not receive anything else beside the photostatic copy of the Steamship West Cheswald bill of lading. I brought that back and the papers which are marked "Plaintiffs' Exhibits 17 and 22 for identification", and gave them to Mr. Brower and told him that the clerk in the Letter of Credit Department told me to come back later in the afternoon.

WILLIAM J. KENNY, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. McNevin:

I reside in New York City and am assistant manager of the Foreign Department of the Bankers Trust Company. I have occupied that position since the 10th of December, 1920, and am familiar with the transactions and communications that passed between the Bankers Trust Company and Lamborn & Company and the National Bank of Commerce of Norfolk, concerning letter of credit No. 105 dated May 11th, 1920, issued by the National Bank of Commerce of Norfolk to Lamborn & Company.

Plaintiffs' Exhibit 23 for identification is Letter of Credit No. 105 of the National Bank of Commerce of Norfolk in favor of Lamborn & Company, dated May 11th, 1920, and issued for account of T. S. Southgate & Company, Norfolk, Va. That letter of credit was mailed to us by National Bank of Commerce of Norfolk, and after we received [fol. 38] it we retained it in our files and notified Lamborn & Company that we had the credit. Plaintiffs' Exhibits for identification Nos. 22, 19, 18, 17, 21, 20 and 20a were presented to us on December 24th, 1920, in the office of the Bankers Trust Company, where I saw them at that time. The Bankers Trust Company stamp on back of Plaintiffs' Exhibit 22 for identification was signed by myself, and

is given as a receipt for the documents presented to us. The writing on the lower righthand corner of Plaintiffs' Exhibit 17 for identification is the rubber stamp of Bankers Trust Company, initialed for by Mr. Charles Brockman. His initials and the stamp were given as a receipt for the original of this letter (Exhibit 17 for identification).

Plaintiffs' Exhibit 17a for identification was received by us on or about December 24th, 1920, at which time I saw it at the office of the Bankers Trust Company. It is the letter for which the writing on the lower righthand corner of Exhibit 17 for identification is a receipt. With the exception of the marks, filemarks, etc., now on it, Exhibit 17a for identification was in exactly the same form as it is now. The mark in pencil in the lower lefthand side is a notation "file" initialed by myself with an arrow extending to the name of Lamborn & Company as directions for the file girl. The letters in pencil in lower lefthand margin "No" were not on the letter when we received it.

The original railroad bill of lading accompanied the Lamborn & Company draft, which we received on the 24th of December. It was the original of the photostatic copy constituting "Plaintiffs' Exhibit 16 for identification."

We did not pay Lamborn & Company a check in the amount of that draft and have never so paid them, and the documents presented to us on December 24th, 1920, accompanying the draft were returned to Lamborn & Company by us about January 5th, 1921, accompanied by a letter marked "Plaintiffs' Exhibit 24 for identification," signed my be. The letter is in the same form at the present time with the exception of the red ink marks and the rubber stamp in the upper lefthand corner. The documents referred to in the letter and which were presented [fol. 39] on December 24th, 1920, were re-presented to me at Bankers Trust Company about January 6th, 1921. They were the same documents as those presented on January 5th, 1921, except for Plaintiffs' Exhibit 22 for identification. The paper now marked "Plaintiffs' Exhibit 25 for identification" was also presented on January 6th, 1921. We did not retain the documents nor pay Lamborn & Company the amount of the draft or any part of it at that time, nor have we since, but we returned the documents on that day to Lamborn & Company with a memo-

randum dated January 6th, 1920 (should be 1921), addressed to Lamborn & Company in my own handwriting refusing payment and returning the documents. That is my handwriting except the word "memoranda", and those are my initials under the letters "B. T. Co." I attached the memorandum to the documents and returned the memorandum and documents to Lamborn & Company's messenger.

After receiving the Letter of Credit marked "Plaintiffs' Exhibit 23 for identification", Bankers Trust Company communicated with the National Bank of Commerce of Norfolk, Virginia, and "Plaintiffs' Exhibit 27 for identification" is the letter received in the mail from that Bank. It was received on or about July 16th, 1920, and has been retained in my file of the correspondence between Bankers Trust Company and National Bank of Commerce of Norfolk. It is in the same condition now as when received with the exception of the file number and rubber stamp put on by our mail clerks and the writing in the lower lefthand corner in my own handwriting.

Prior to December 10th, 1920, and after May 1st, 1920, I was the teller in the Foreign Department in charge of the Commercial Credit Division and was in charge of the letter of credit called 105, issued by the National Bank of Commerce of Norfolk, Virginia, to Lamborn & Company.

Plaintiffs' Exhibit 28 for identification is the letter from Bankers Trust Company dated July 16th, 1920, to Lamborn & Company relative to credit 105 of the National Bank of Commerce of Norfolk, signed by Mr. C. F. Bock, assistant manager of the Foreign Department. Plaintiffs' Exhibit 29 for identification was first seen by me about December [fol. 40] 28th, 1920, at the office of Bankers Trust Company and it was received through the mail or delivered by hand and has been in the files of the Bankers Trust Company ever since. After January 6th, 1921, we received correspondence from the National Bank of Commerce of Norfolk relative to letter of credit 105 and draft drawn thereon, and notice of protest from the Notary who protested the draft. The notice of protest, plaintiffs' Exhibit 30 for identification, was received on or about January 8th, 1921. I believe it was delivered by hand. We notified the National Bank of Commerce of Norfolk, Virginia, that the item had been

protested and filed a notice of protest. Plaintiffs' Exhibit 31 for identification is a copy of the letter notifying the National Bank of Commerce of Norfolk of the receipt of notice of protest by us, with the exception that the original is on our letterhead.

Plaintiffs' Exhibit 32 for identification was received by Bankers Trust Company, through the mail from the National Bank of Commerce of Norfolk, Virginia, and referred to me for attention. After reading it it was regularly filed and has been in our files up to the present.

Plaintiffs' Exhibit 33 for identification was received in the office of Bankers Trust Company from the National Bank of Commerce, Norfolk, Virginia, December 13th, 1920, was filed and except for the rubber stamps and pencil markings on it is in the same condition as it was at that time. The statement in that letter, "We beg to ask therefore that you kindly notify us by wire when the documents are presented, so that we can arrange to examine and approve them", were observed by me, and I notified the Bank of Commerce in accordance with that request. They did not cause an examination and inspection to be made of the documents after notification that we had received them.

Plaintiffs' Exhibit 34 for identification is a copy of Bankers Trust Company letter of December 13th, 1920, in answer to the letter from the National Bank of Commerce of Norfolk, Virginia, which has been marked "Plaintiffs' Exhibit 33 for identification", and is in all respects a true copy of the original, except that the original is on the letterhead of the Bankers Trust Company. The signa- [fol. 41] ture is that of J. F. Schmid, Vice-President of Bankers Trust Company.

We notified the defendant Bank of the presentation of the documents on December 24th, 1920, by telegram, and Plaintiffs' Exhibit 35 for identification is a copy of our telegram of December 20th, 1920, relative to the draft and documents. After the receipt of letter of credit No. 105, Plaintiffs' Exhibit 23 for identification, we acknowledged the credit and placed the letter in our files, acknowledgment being made by letter of which Plaintiffs' Exhibit 35 for identification is a copy, the original being signed by F. A. Klingsmith, Assistant Treasurer. Plaintiffs' Exhibit 37 for identification is a letter dated September 3rd,

1920, from National Bank of Commerce of Norfolk, Va., to Bankers Trust Company, arriving September 7th, 1920, by mail. Plaintiffs' Exhibit 38 for identification is a copy of Bankers Trust Company's reply to the letter received from National Bank of Commerce of Norfolk, dated September 3rd, 1920, dictated by myself and signed by F. A. Klingsmith, Assistant Treasurer. This letter was acknowledged by letter on September 14th, from the National Bank of Commerce of Norfolk, Va., marked "Plaintiffs' Exhibit 32 for identification."

JOSEPH N. LOMEDICO, being duly sworn and examined as a witness for the plaintiffs, testified as follows:

By Mr. McNevin:

I reside at 1760 West 13th Street, Brooklyn, and am a Notary Public for the State of New York and held that office in 1921 for King's County, and have a certificate filed in New York County. I was authorized to take protests on negotiable instruments in New York County at that time and Plaintiffs' Exhibit 30 for identification is an original protest with my signature on it in my capacity as Notary Public. After signing it I took it to the Bankers Trust Company personally, asked for payment which was refused, and naturally I protested the document, presenting with the draft Plaintiffs' Exhibits 19, 20, 20a and 21 for identification and original of photograph of railroad [fol. 42] bill of lading marked "Plaintiffs' Exhibit 16 for identification."

Plaintiffs' Exhibit 18 is the original draft for $48,009.81, dated December 20th, 1920, drawn by Lamborn & Company on the Bankers Trust Company, protested by me on January 7th, 1921. It is the draft to which the protest marked "Plaintiffs' Exhibit 30" relates. I mailed a copy of the protest marked "Plaintiffs' Exhibit 30 for identification" to the National Bank of Commerce of Norfolk, Virginia, and another one to the Bankers Trust Company of New York, another to T. S. Southgate & Company, Norfolk, Va., and one I delivered personally to Lamborn & Company, to Mr. N. Nelson Keen.

(NOTE.—Plaintiffs' Exhibit 30 for identification offered in evidence).

I was paid the fee and disbursements of $1.20 by Lamborn & Company.

The draft referred to in this witness' testimony and marked Exhibit No. 9, is in the words and figures as follows, to-wit:

"PLAINTIFFS' EXHIBIT 18 FOR IDENTIFICATION—4/17/22.
H. C. T.

DS-2855

Lamborn & Company

$48,009.81. New York, December 20, 1920. 192-.

At sight pay to order of ourselves forty-eight thousand and nine dollars 81/100 Dollars, with exchange, value received, and charge the same to account of T. S. Southgate & Company, Norfolk, Va.
6/11/20.

National Bank of Commerce, Norfolk, Va.

L/C-105 5/11/20.

[fol. 43] To Bankers Trust Co., New York City. Lamborn.
No. —.
Endorsed by Lamborn & Co.
January 7, 1921. Protested for non payment. Joseph N. Lomedico, Notary Public. (Seal.)

WILLIAM H. LIGNANTE, being recalled as a witness for the plaintiff, testified as follows:

By Mr. Bentley:

About December 17th, 1920, I brought the papers marked Plaintiffs' Exhibit 53 for identification out with me from New York to Philadelphia filled in in blank, that is, without the car numbers on there, and after these sugars were shipped the car numbers were inserted by the rail-

way company, and I received this bill of lading in return, (Plaintiffs' Exhibit 53 for identification) this and the original after it had been signed by the railroad company. It was signed by William Hayes, the man in charge of Pier 56, South Philadelphia, the pier at which the West Cheswald was docked in December, 1920. The same person signed Plaintiffs' Exhibit 53 for identification that signed the original of Plaintiffs' Exhibit 16 for identification. I saw the original of Plaintiffs' Exhibit 16 for identification signed at the same time and place, and the signature on Plaintiffs' Exhibit 53 for identification is an original signature.

I saw Mr. Hayes at his office outside of Pier 56, Philadelphia. That is a railroad company pier. He was tallying and sealing cars and then he would order the yard master to send an engine down for the filled cars, and then sign up these bills of lading.

The string of three piers there are called the Washington Avenue wharves of the Pennsylvania Railroad. I saw [fol. 44] Hayes sign other bills of lading purporting to be railroad bills of lading, around eight- or ninety I should judge. I was referred to him by Mr. Considine's office of the Pennsylvania Railroad. I paid the charges incurred on the sugar while on the pier after being discharged from the West Cheswald and before it was put on the cars, that is, the duty, trucking and tiering on the pier, and weighing cars, to George J. Hoffman & Company for Lamborn & Company; also the stevedore on the pier, Loveland & Company, and overtime for the talley clerks to the Atlantic Coast & Shipping Company. The duty covered by Exhibit 16 and 53 for identification was paid before the sugar was placed aboard cars.

Then counsel read the following letter marked "Plaintiffs' Exhibit 17-a" for identification, and "Plaintiffs' Exhibit No. 8" of this record:

PLAINTIFFS' EXHIBIT 8

"New York, December 23rd, 1920.

Bankers Trust Company, 16 Wall Street, New York City.

GENTLEMEN: We herewith beg to hand you shipping documents covering 1,000 bags of Java White Sugar, amounting

to $48,009.81, to apply against your Letter of Credit dated 6/12/20, opened in our favor for account of T. S. Southgate & Company, Norfolk, Va.

The injunction granted, copy of which was served upon you, authorizes us to deliver documents to your goodselves, and you to retain same subject to further order of the court upon this injunction, which at present only prevents Lamborn & Company from accepting payment for the above shipment.

Yours very truly, Lamborn & Company. N. Nelson Keen, Member of Firm."

JB.FB.

[fol. 45] This letter was offered in evidence and in connection therewith the accompanying papers were offered, fastened together as a single exhibit marked "Plaintiff's Exhibit No. 9," being the draft dated at New York December 20th, 1920, numbered 2855 for the amount of $48,009.81 drawn by Lamborn & Company on the Bankers Trust Company, value received and charge the same to T. S. Southgate & Company 6/11/20 National Bank of Commerce, Norfolk, Virginia, and endorsed by Lamborn & Company; also the invoice of Lamborn & Company dated December 20th, 1920, reading as follows:

"Lot No. P. C. 22. Order No. SS. West Cheswald.
Invoice No. DS—8622. Sold to T. S. Southgate & Co. Norfolk, Va.
Terms Bankers Trust Co. 6/11/20.
National Bank of Commerce, Norfolk, Va.
L/C—105—5/11/20.
1,000 bags of Java White Sugar.

1,000 bags of Java White Sugar, Net Weight 222,680 lbs., at 22¢ per lb. Duty paid F. O. B. Cars Philadelphia, Pa. Landed Weights	$48,989.60
Less 2%	979.79
	$48,009.81

C R I & P—40979 335 Bags.
Soo Line 36470 335 " E. & O. E.
T & N O 31041 330 "
SD—2855.
(Certified weight sheet attached.)"

And accompanying that the certificate dated at New York September 23rd, 1920, reading as follows:

"New York, December 23, 1920.

To whom it may concern:

This is to certify that the 1,000 bags of Java White Sugar [fol. 46] invoiced by us on our DS No. 8622, to T. S. Southgate & Co., Norfolk, Va., were unloaded from the S/S "West Cheswald," and ocean bills of lading are on file in our office dated Samarang, Java, Sept. 30, 1920.

Yours very truly, Lamborn & Company, N. Nelson Keen, Member of Firm.

PJB/FB.

Sworn to before me, this 23rd day of Dec., 1920. Joseph N. Lo Medico, Notary Public. (Seal.)"

Together with the sworn certificate of George J. Hoffman & Co., weighers, dated December 17th, 1920, reading as follows:

"New York, December 17th, 1920.

Return of 1,000 Bags Sugar weighed for Mess. T. S. Southgate Co., Norfolk, Va. By order of Mess. Lamborn & Co. Ex. S. S. "West Cheswald."

Car	CRI&P	40979	335	Bags	wg.	75420	lbs.	gross
	MSPSM	36470	335	"	"	75620	"	"
	TNO	31041	330	"	"	74240	"	"

1000 Bags wg. 225280 lbs. gross
2600 lbs. tare

222680 lbs. net

Geo. J. Hoffman & Co."

And the receipt of the Bankers Trust Company for the shipping documents, a duplicate invoice being introduced as "Plaintiff's Exhibit No. 10," reading as follows:

[fol. 47] "Lamborn & Company, 132 Front Street, New York

Lot No. P C 22.
Order No. SS West Cheswald.
Invoice No. DS—8622. December 20, 1920.
Sold to T. S. Southgate & Co.,
Norfolk, Va.

Bankers Trust Co. 6/11/20
Terms
MK Nat'l Bank of Commerce, Norfolk, Va.
L/C—105—5/11/20.

1000 Bags of Java White Sugar.

1,000 Bags of Java White Sugar, Net Weight 222,680 lbs. at 22¢ Per Lb. Duty Paid F. O. B. Cars Philadelphia, Pa. Landed Weights	$48,989.60
Less 2%	979.79
	$48,009.81

C R I & P—40979 335 Bags.
Soo Line 36470 335 " E & O E.
T & N O 31041 330 "
(Certified Weight Sheet attached.)"

Counsel for the plaintiff then read the deposition of Joseph Lynch beginning on page 76 of the deposition taken in New York on April 17th, 1922, and it was stated that counsel for the defendant conceded the exhibits referred to in that deposition as being the same that were introduced as Exhibits 9 and 10.

N. Nelson Keen, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. Van Doren:

I reside in Upper Montclair, New Jersey, and in Decem-
[fol. 48] ber, 1920, and January, 1921, was a member of the firm of Lamborn & Company, New York City. I was the member of that firm who had special duties in connection with the collection of drafts against letters of credit. I remember the letter of credit which was posted for the benefit of Lamborn & Company by the National Bank of

Commerce of Norfolk, Virginia, with the Bankers Trust Company, and I noticed as it was read, a certain exhibit here referred to in the injunction, and I recall that the injunction was vacated. After the vacation of that injunction I went to the Bankers Trust Company with the bundle of papers that I have in hand (these papers are papers heretofore introduced as Exhibits 7, 8 and 9). I had, before going to the Bankers Trust Company with those papers, received a letter from the New York office of said Company, dated January 5th, 1921, (letter marked for identification "Plaintiff's Exhibit No. 24" not offered in evidence). On January 6th, 1921 I went to the Bankers Trust Company and saw Mr. Kent, a Vice-President, and also Mr. Smith, a Vice-President. I pointed out to Mr. Kent that the injunction against this letter of credit had been vacated by a court order and the documents were now in order for payment under the letter of credit. We had some little discussion there about it, the exact words of which I don't remember, but Mr. Kent told me that they had been instructed by the National Bank of Commerce of Norfolk, Va., not to pay the credit and as they were only the paying agents and had not confirmed the credit to us, they would have to abide by the instructions received from the National Bank of Commerce, their principal, and after that discussion I went back to our office. I had the complete papers with me and the bank officers looked them over. I would not like to say definitely whether or not anything was said to me concerning their form or contents, but I think the bank felt the papers were in order.

When this irrevocable letter of credit was first issued the Bankers Trust Company were made the New York paying agent for the National Bank of Commerce of Norfolk. The letter of credit itself was delivered to our firm.

When this cargo of sugar came in from Philadelphia, the draft with the bill of lading attached was presented at the New York office of the Bankers Trust Company, the documents being dated December 24th and the railroad [fol. 49] bill of lading being dated December 17th. The draft is dated December 20th, 1920 and was presented at the Bankers Trust Company on December 24th, at which time payment was refused. Later on January 6th or 7th, I personally presented all of these papers and asked to have the draft taken up. In the meantime the sugar had

gone forward and the bill of lading continued in our posession until it was presented the second time on the 6th, that is, after it had been sent back to us. On January 6th, 1921 the officers of the Bankers Trust Company did not state any objection as to the form of contents of my draft and shipping documents. I demanded payment of the draft and payment was not made. The draft was protested and the documents were taken back by me.

NOTE.—The plaintiff offered in evidence the protest of the draft, marked "Exhibit No. 11," of which the following is a copy:

EXHIBIT No. 11

UNITED STATES OF AMERICA,
State of New York, ss:

On the seventh day of January in the year of our Lord one thousand nine hundred and twenty-one at the request of the holder thereof, I, Joseph N. Lo Medico, a Notary Public, duly commissioned and sworn, dwelling in Kings County did present the original instrument hereunto annexed, to a person in charge of the office of Bankers Trust Company, 16 Wall St. in the City of New York (being the place where the said instrument is payable) and demand payment thereof, which was refused:

And answer "Will not pay."

Whereupon, I, the said Notary, at the request aforesaid, did protest, and by these presents, do publicly and solemnly protest as well against the Drawer and Endorsers of said instrument, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages and interest already incurred, and to be hereafter incurred, for want of payment of said instrument.

[fol. 50] In testimony whereof, I have hereunto set my hand and affixed my seal at the above date as aforesaid.

Joseph N. Lo Medico, Notary Public. (Seal.)

Lamborn & Co., New York.
Nat'l Bank of Commerce, Norfolk, Va.
Bankers Trust Co., New York.
T. S. Southgate & Co., Norfolk, Va.

Cross-examination.

By Mr. Taylor:

I received the letter of January 5th from Bankers Trust Company to Lamborn & Company, being exhibit No. 24. That refers to a telegram or wire from the Bank of Commerce to the Bankers Trust Company. The documents that I have referred to as being presented by me to the Bankers Trust Company had reference to sugar exclusively. That sugar was shipped in September from Java and destined for Philadelphia.

Q. Why do you say that?

A. That was the destination of the cargo.

Q. Of the "West Cheswald"?

A. The option was Port Said for orders—the ocean bill of lading.

Q. When it reached Port Said, what were the orders?

A. I think there were no definite orders given. I think the bill of lading called for Port Said, option New York, and as we did not give them any definite instructions at Port Said, she proceeded on towards New York.

Q. To New York?

A. Yes.

Q. Is it not a fact that your firm gave a dollar a ton for the privilege of diverting that vessel three days before she docked?

A: It is.

After we had not exercised the option at Port Said I feel that we had lost authority to divert the steamer to any place we wanted her on the Atlantic Coast. It was a fact that she was on her way to New York when she was diverted. If we hadn't diverted her she would have come to New York.

[fol. 51] Q. And prior to December 13th, 1920, she was never destined to Philadelphia?

A. Not at that time; no, sir.

Q. So up to the 13th of December, there was no shipment on the high seas destined for Philadelphia out of which this sugar could have been delivered?

A. I don't say that. I think we had another cargo.

Q. There was certainly none in the "West Cheswald"?

A. I consider we had the option, if we wanted to exercise it, with consideration, to put her into Philadelphia, Baltimore or Boston.

Our obligation in the shipment in question was a shipment from Java to Philadelphia and we had to pay, three days before docking, a dollar a ton to exercise an option in favor of Philadelphia.

I am familiar with the terms of this letter of credit and with the language: "If impossible to comply with the conditions above stated, communicate with us before making shipment. The conditions embodied in this credit must be adhered to; otherwise payment will not be effected. That language has always been a part of the contract."

At this point the following admission was inserted in the record by consent of counsel:

"All the plaintiffs are citizens of states other than the State of Virginia, and the defendant is a National Banking Association duly chartered, organized and doing business under the laws of the United States of America with its principal office in the City of Norfolk, in the Eastern District of Virginia. The partnership as alleged is admitted. It is further admitted that the duty on the sugar has been paid."

At this point plaintiffs rested.

Defendant's Motion for Directed Verdict

And thereupon counsel for the defendant moved the Court to direct the jury to find a verdict in favor of the defendant upon the following grounds:

1. That the letter of credit of May 11th, 1920, which is the subject of this suit provides that there should be a shipment of the sugar in question during the months of [fol. 52] August and September, 1920, at the option of Lamborn & Company, by steamer or steamers from Java to Philadelphia, and the evidence introduced in the case shows that said condition was not complied with on two grounds:

(a) The evidence introduced as to shipment on the "West Cheswald," being an ocean bill of lading dated at Samerang on September 30th, 1920, and signed at Batavia by a witness who was not in touch with and did not actually see the merchandise in question and whose evidence clearly shows that it was not intended to be a receipt of merchandise until certain other formalities had been complied with, namely, the furnishing of the Mate's receipt as to which there was no evidence; and (b) that the evidence introduced and relied on by the plaintiffs showed a shipment of sugar from Samerang, Java to Port Said, Egypt, with the option to New York, and the evidence further shows that the vessel even assuming that she was loaded, or that the sugar in question was shipped on the 30th day of September, 1920, was destined and on her way to New York from that time until the 13th of December, 1920, and was diverted by request from Lamborn to the Shipping Board and upon a payment of One Dollar ($1.00) per ton for the privilege of diverting said vessel three days before she actually docked at Philadelphia, and that up to that time it was a shipment from Java to New York and nowhere else.

2. That the railroad bill of lading which was tendered with the documents for payment to the Bankers Trust Company did not call for "Java white sugar" but simply "Java sugar."

ORDER OVERRULING MOTION FOR DIRECTED VERDICT

Whereupon said Court overruled said motion for a directed verdict in favor of the defendant, giving its reasons as follows:

"Gentlemen, I have been very much interested in the argument and very much benefited by the very thorough way in which it has been treated by counsel. The three points on which Mr. Taylor based his argument I have already considered one of and practically disposed of it, [fol. 53] that is as to the compliance with the terms of the letter of credit in the matter of the shipment of the sugar

and it is only necessary, as far as I am concerned, to say that it seems to me that the provision that it should be shipped in August or September was shown to have been complied with by the bill of lading dated not later than the 30th of September and by the evidence supplied by the deposition as well. Whether that is a fact or not, it establishes it in such a way that it throws the burden of disproving it upon the other side, and that being true and not being met, the motion as to that point is overruled.

The second point that the shipment had to be from Java to Philadelphia from its inception without any diversion after the ship had left the original port of loading seems to me to find such support as there may be said to be to that position in the right of the purchaser of the sugar to insure his interest and his profits, and if that be true, that condition would not apply in the case of a guarantor like a bank furnishing a letter of credit, and in determining the question of compliance with the terms of the letter of credit, it seems to me the only guide can be the terms of the letter of credit itself. That provides that shipment be made during August and September, 1920, at option of seller by steamer or steamers from Java to Philadelphia. There isn't any suggestion that the shipment was not from Java and it is equally true and a concession in the case that the ultimate destination of the steamer was Philadelphia. It happens that that destination was accomplished, as Mr. Taylor points out, as the result of a subsequent arrangement with the owner of the steamer just three days out of port by which in consideration of a bonus freight rate, she was diverted from New York, her original destination, to Philadelphia. If we were dealing with a contract between Southgate & Company and Lamborn & Company in which the contract required that they should designate the ship on which the cargo was to be loaded and which was to be used for the transportation of the cargo, that, of course, would be an essential part of the contract and the insurable interest which the Supreme Court spoke of in the Scotland case, the steel case, would at once arise when the declaration was made, and I can very readily understand that an insurable interest in a contract requir- [fol. 54] ing a shipment of sugar to Philadelphia might not

obtain in a case of a shipment to New York, but, as I intimated a moment ago, that contract is not in evidence in this case. I don't know what its terms may be, and the suit is on a letter of credit issued by the bank."

(NOTE.—Counsel for defendant here stated that that contract is in this case as one of the plaintiffs' exhibits in the same language as the letter of credit.)

"It may be in the case, but it seems to me very clear that the rights of the defendant in this case can't extend beyond the terms of the letter of credit itself and the letter of credit is complied with, it seems to me, by the shipment in a reasonable time, of course, from Java and the arrival within a reasonable time at Philadelphia. I can't imagine that the contract contemplates or requires that there must have been all the time, from the inception of the voyage, the intention and purpose to send the vessel to Philadelphia. If the intention occurred and was consummated by the act itself any time after the voyage commenced, it seems to me it would be a compliance with the contract. It would be all that reason and fair play and justice would require.

I was very much interested in the Supreme Court case and, of course, if it is parallel with this I should have to follow it and be bound by it, but I do see a difference between a shipment from Leith and a shipment from Glasgow. The delivery of this sugar at New York would unquestionably have been a non-compliance with the contract which would have avoided this letter of credit, so the shipment of this sugar from some other point than Java would have been a non-compliance with the contract, notwithstanding the precise quantity and precise character and quality of sugar furnished, but to say that although the exact terms of the contract were complied with, because it was not the purpose or not the intention or not the arrangement that what was done should be done at the beginning, vitiated this guarantee, it seems to me is going farther than I think I have any right to go and, of course, I am influenced to some extent by the fact that Judge Hand had decided this question in the Southern District of New York and the Supreme [fol. 55] Court of Pennsylvania has likewise decided, as I see, precisely the same question. While I am not bound by either, they are persuasive, and I should be very loath to

depart from the decisions announced by those courts in an identical case, unless, as I see it, the question is foreclosed by some other decision by some court by which I am bound. The third point that the bill of lading does not describe the sugar accurately in that it says so many bags of sugar rather than so many bags of white sugar, it seems to me the failure, if there is any in that respect, is supplied by the accompanying invoice which is a paper provided for in the contract itself by the bank. The bank made it a condition of the payment of the money that there should be furnished a bill of lading and an invoice and it seems to me if the one supplies any deficiency in the other, at least as far as the description is concerned, it was in contemplation of the parties that would have been the purpose and the only purpose of the invoice. The draft itself was for the precise amount of money covered by the contract. The bill of lading was for the delivery of the sugar, and the only purpose of an invoice would be to acquaint the bank with the statement of the seller as to the quantity and quality and character of the thing itself, and it seems to me to be in line with this case in 282 Federal. Certainly it is what is reasonable under the circumstances. With the weigher's certificate and the invoice of the seller, if the purchaser had felt that he was taking a chance in paying the draft before delivery of the sugar because he didn't know its quality, it seems to me that in fair play some arrangement coud have easily been made by which the information could have been furnished as by inspection which, had he applied for it, would have been furnished by the seller of the sugar, or the right to inspection, he having then possession of the bill of lading and control of the shipment. So it seems to me it wouldn't be in the interest of justice to say that such a failure as that was basic and was such as would justify a court in causing a breach of contract otherwise complied with when there isn't any real contention that the contents were not as they were represented to be, so that with great diffidence, gentlemen, I am impelled to overrule the motion for a directed verdict."

[fol. 56] To which action of the Court in so overruling the said motion the defendant by counsel duly excepted and tenders this, its bill of exceptions and prays that the same

may be signed, sealed and made a part of the record, which is accordingly done.

Counsel for the defendant then introduced all of the depositions, together with the exhibits accompanying the same that were not introduced and presented by the plaintiff in making out its case and which had been taken by the plaintiff. These depositions are as follows:

Depositions taken pursuant to notice on behalf of the plaintiff at the office of Van Doren, Conklin, McNevin and McClenthen, Room 1115, No. 31 Nassau Street, New York City, February 10th, 1922.

GIICHI ISHIDO, being duly sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. Van Doren:

My name is Giichi Ishido, I reside at 500 West 140th Street, New York City, apartment 4 B. I am over twenty-seven and a clerk of Suzuki & Company, whose place of business is 220 Broadway, New York City. Their head office is in Kobe, Japan, and their general business is that of Importers and Exporters. They are the agents for the Teikoku Kisen Kabashiki Kaisha Steamship Line. I have been with the company about four years. In 1920 I was in Java and at that time I knew M. Kamimura I knew him from August to November 11th, 1920, in Surabaya, where he was in the sugar business, that is, he was the manager of Suzuki & Company, in Surabaya, and handled sugar shipments for that Company. I arrived in Surabaya August 10th and stayed there continuously until November 11th, 1920. Mr. Kamimura was staying in Soerabaya and sometimes in Semarang. I saw him frequently and came to know him quite well.

I was a clerk for Suzuki & Company in Soerabaya and was handling sugar shipments. He was my superior there. I know his signature quite well. I know the seven papers which you show me very well. They are in the form used by Suzuki & Company, as agents for the Teikoku Kisen [fol. 57] Kabashiki Kaisha Steamship Company. While I

was a clerk in the office of Suzuki & Company, Soerabaya, Java, those papers came into my hands and I examined them in the course of my duties.

I recall the Steamship Chifuku Maru. I don't know what line she belonged to but Suzuki & Company were agents for her. I recognize the signature of M. Kamimura on each one of those seven papers.

(Note—Paper Number 5 is marked "Plaintiff's Exhibit 1" for identification. Paper Number 6 is marked "Plaintiff's Exhibit 2" for identification.)

In the papers 8, 9 and 10 the alteration or substitution of the word "Philadelphia" for "New York" was made on the papers by myself in my own handwriting.

(Note—Paper Number 8 is marked for identification "Plaintiff's Exhibit 3." Paper Number 9 is marked for identification "Plaintiff's Exhibit 4." Paper Number 10 is marked for identification "Plaintiff's Exhibit 5." Paper Number 11 is marked for identification "Plaintiff's Exhibit 6." Paper Number 12 is marked for identification "Plaintiff's Exhibit 7."

The words "as arranged" in ink were on Exhibits 1, 3, 4 and 5 before they were delivered to me. The words "as arranged" on exhibits for identification 2, 6 and 7 in type were also on those papers before they came into my hands.

Plaintiff's Exhibits for identification 1, 2, 3, 4, 5, 6 and 7 are genuine bills of lading issued by Suzuki & Company at Soerabaya, Java, for the Steamship Chifuku Maru. I have examined the dates of the respective bills of lading, being Plaintiff's Exhibits for identification 1 to 7 inclusive.

I have Suzuki & Company's office copy of No. 11, being Plaintiff's Exhibit for identification No. 6, which came from Soerabaya to Suzuki & Company in New York. That office copy shows that the date of No. 11 is September 24th, 1920. All of those documents were delivered by Suzuki & Company on the date of issue, that is, the date loading of the cargo was finished. I don't remember exactly whether or not that was the dates that were on the documents but [fol. 58] likely within ten days or two weeks. The signature to the endorsement under the typewritten words "per

pro Suzuki & Company" on Plaintiff's Exhibits for identification 1 to 7 inclusive, is the genuine signature of M. Kamimura.

JINOSUKE MINAMI, being duly sworn and examined as a witness for the plaintiff, through an interpreter, also duly sworn, testified as follows:

By Mr. Van Doren:

I live at 135 Kelvin Street, Forrest Hills, Long Island. I am thirty-five years of age and the New York representative of Suzuki & Company of Kobe. I am the Manager of Suzuki & Company in New York. They are agents for the Teikoku Kisen Kabashiki Kaisha. Suzuki & Company is a partnership and not a corporation.

I know M. Kamimura personally. His first name is Masakichi. I have known him for four or five years. He is employed by Suzuki & Company and was, I am informed, in September 1920 in Soerabaya.

Suzuki & Company were agents for the Steamship Chifuku Maru. That was the ship of the line Teikoku Kisen Kabashiki Kaisha.

I know the signature of M. Kamimura in the Japanese form, but the signatures on the bills of lading, Plaintiff's Exhibits 1 to 7, inclusive, for identification, are written in English script.

H. VICTOR CRAWFORD, being introduced on behalf of the plaintiffs and being duly sworn testified as follows:

I live at 31 Irving Street, Montclair, N. J., and am a lawyer by profession, connected with the firm of Hunt, Hill & Betts, 120 Broadway, New York City. I was connected with that firm in November and December 1920 and know generally the firm of T. S. Southgate, Daniel M. Thornton and Elias Etheridge, comprising the copartnership firm of T. S. Southgate & Company. I know Mr. Thornton personally.

[fol. 59] We represented them in an action against Lamborn & Company. In connection with the suit brought by us against Lamborn & Company we had occasion to talk to Mr. Thornton about the contract between Lamborn &

Company and T. S. Southgate & Company, dated April 23rd, 1920, and we saw the duplicate original of the contract in Mr. Thornton's possession. It is the duplicate original of Plaintiffs' Exhibit 39 for identification. As to the same signatures appearing thereon I am sure about Lamborn & Company's signature and it is my recollection that Thornton had signed the copy of the contract I had for Southgate. We received all of the correspondence that passed between the parties in interest from the date of the contract to December 13th, 1920. I saw the originals of all of the letters from Lamborn & Company to T. S. Southgate & Company, the first dated August 30th, 1920, marked "Plaintiffs' Exhibit 40 for identification"; the second dated September 29th, 1920 marked "Plaintiffs' Exhibit 41 for identification"; the third dated November 10th, 1920, marked "Plaintiffs' Exhibit 42 for identification," and the fourth dated December 13th, 1920, marked "Plaintiffs' Exhibit 43 for identification." We had them in our possession for some time. They were part of the letters which we received by special delivery from T. S. Southgate & Company early in December 1920, except the original of the one marked "Plaintiffs' Exhibit 43 for identification" and the original of that letter we received shortly after its date from T. S. Southgate & Company. We received a request from T. S. Southgate & Company about January 13th, 1921, to return these papers for the use of the Bank in Norfolk and on January 13th we forwarded the contract and all of the letters, copies of which have been marked for identification here. Later, on February 23rd, we mailed to T. S. Southgate & Company all papers in our possession, which had any bearing on the Chifiku Maru shipment. We received an acknowledgment of these letters and contract by letter from T. S. Southgate & Company, dated February 24th, 1921, reading as follows:

[fol. 60] "T. S. Southgate & Company, Norfolk, Va.

February 24th, 1921.

Messrs. Hunt, Hill & Betts, No. 120 Broadway, New York, N. Y.

Gentlemen: We have your letter of February 23rd, enclosing additional correspondence in regard to our Chifuku case and thank you for your promptness in sending it.

Yours very truly, T. S. Southgate & Co. Thornton."

The matters to which I have testified today have been concerning the existence of the contract marked for identification "Plaintiffs' Exhibit 39," and the letters copies of which have been marked "Plaintiffs' Exhibits for identification 40 to 43," inclusive. So far as our firm are connected with the same, they are matters of public record in New York County. They are all attached to complaints and affidavits filed in the County Clerk's Office of New York County on or about the 15th day of December, 1920, in an action entitled "Southgate & Company against Lamborn & Company, Action No. 2."

N. NELSON KEEN, being sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. McNevin:

I reside in Upper Montclair, New Jersey, and in 1920 and in the early part of 1921 was a member of the firm of Lamborn & Company, who were a firm of sugar brokers and merchants, exporters and importers, and were a co-partnership.

Lamborn & Company had quite a lot of business dealings [fol. 61] with T. S. Southgate & Company in 1920 and with the National Bank of Commerce of Norfolk, Virginia, in the fall of 1920 and early in 1921.

Plaintiffs' Exhibit 39 for identification is a sales contract on 1000 bags of Java sugar, 10% more or less, to T. S. Southgate & Company, Norfolk, Va., dated April 23rd, 1920. The signature of Lamborn & Company thereon is my signature, signed by me on behalf of Lamborn & Company. Plaintiffs' Exhibit 23 for identification is a letter of credit issued by the National Bank of Commerce, Norfolk, Virginia, dated May 11th, 1920, for $53,123.84, covering 1000 bags, 10% more or less, of Java white sugar, at 22¢ per pound, less 2%, duty paid f. o. b. cars Philadelphia, Pa., landed weight, payable at the Bankers Trust Company, New York City. That letter of credit was accepted by Lamborn & Company.

Plaintiffs' Exhibit 28 for identification is an original letter from the Bankers Trust Company, dated July 16th, 1920, referring to credit No. 105, dated May 11th, 1920,

from the National Bank of Commerce, Norfolk, Va., eliminating the requirement of an ocean bill of lading to be produced with documents showing shipment from Java to Philadelphia. That letter was accepted by Lamborn & Company as a modification of letter of credit marked "Plaintiffs' Exhibit 23 for identification."

Lamborn & Company made a shipment of Java white sugar from Java in the month of September, to Philadelphia, in steamers in sufficient quantity to fulfill the contract with T. S. Southgate & Company which has been marked "Plaintiffs' Exhibit 30 for identification." The Steamer West Cheswald, Steamer Chifuku Maru and the Steamer Washington Maru carried such shipments, each of them carrying Java white sugar shipped in the month of September from Java to Eastern Atlantic ports of the United States. The West Cheswald and the Chifuku Maru had approximately 4,000 tons of sugar for Lamborn & Company, and the Washington Maru had about 1,000 tons. That would be about 10,000 bags on the Washington Maru, 34,000 bags on the Cheswald, and about 40,000 bags on the Chifuku Maru. Lamborn & Company had purchased this sugar prior to shipping date, in all cases, from Java by written contract.

The papers which you show me are photostatic copies [fol. 62] of the original contract dated April 9th, 1920, between Lamborn & Company, buyers and the Nederlandsche Maatschappy Voor Ovezee Handel, sellers. The original was in Lamborn & Company's office. We gave them back and accepted duplicate original. I do not know where the original is at the present time. It cannot be found.

(Paper marked "Plaintiffs' Exhibit 44 for identification.")

In reference to the second paragraph of that contract covering sugar for shipment during September, 1920, the largest part of that sugar was shipped on the Steamer West Cheswald and the balance on the Steamer West Conifax.

The paper writing dated April 12th, 1920, handed me by you is an original contract between Lamborn & Company, buyers and Czarnikow-Rionda Ltd., London. It is produced from the files of Lamborn & Company.

(Note—Paper marked "Plaintiffs' Exhibit 45 for identification.")

That contract was performed by both the sellers and buyers and the sugar referred to therein was shipped from Java in the month of September 1920, the larger portion by the Steamer Chifuku Maru and the balance by the steamer Washington Maru. The Chifuku was destined for and ultimately arrived at Philadelphia, Pa.

Referring to Plaintiffs' Exhibit 44 for identification I was aware of its terms at the time of its delivery to Lamborn & Company. Its terms were performed by the parties thereto, the steamer West Cheswald arriving at Philadelphia, Pa. Sugar from that shipment was tendered to T. S. Southgate & Company in performance of Plaintiffs' Exhibit 39 for identification.

Plaintiffs' Exhibit 17a, dated December 23rd, 1920, was signed by me and was sent to the Bankers Trust Company with the shipping documents. Plaintiffs' Exhibit 17 for identification is a carbon copy of the letter that I have just identified as Plaintiffs' Exhibit 17a for identification.

[fol. 63] (NOTE.—Sheaf of papers handed witness are marked "plaintiffs' Exhibit 46 for identification.")

Those papers were served on me on or about December 15th, 1920, at No. 132 Front Street, New York City, at the office of Lamborn & Company. After December 15th, 1920, Lamborn & Company presented draft and shipping documents to the Bankers Trust Company. Exhibit 17a for identification was one of the papers presented with the draft and shipping documents. It was prepared on or about December 23rd, 1920. I saw Plaintiffs' Exhibit 18 at the time it was signed by me at the Company's office, being a sight draft for $48,009.81 drawn on the Bankers Trust Company, New York City, by Lamborn & Company. The endorsement thereon "Lamborn & Company" is in my handwriting. Accompanying these papers was an invoice in duplicate, dated December 20, 1920, amounting to $48,009.81, being Plaintiffs' Exhibits 20 and 20a for identification. Plaintiffs' Exhibit 19 for identification is a weight return covering 1,000 bags, of George J. Hoffman & Company, dated December 17th, 1920. Plaintiffs' Exhibit 21 for identification was signed by me and accompanied the papers sent to Bankers Trust Company on or about December 23rd, 1920, as did the original bill of lad-

ing covering a shipment of 1,000 bags. The photographic copy here exhibited as Plaintiffs' Exhibit 16 for identification is an accurate and true photographic copy of the front and back of the said railroad bill of lading. The original was endorsed by Lamborn & Company in blank, by Leonard Elsmith. He was authorized to sign the name of Lamborn & Company, being my assistant at that time.

Plaintiffs' Exhibit 24 for identification came to my attention at or about the time it is dated. The paper on the letterhead of the National Bank of Commerce, dated July 17th, 1920, was received by us on or about the 19th of July, 1920.

(NOTE.—Paper is marked "Plaintiffs' Exhibit 47 for identification.")

During the fall of 1920 we knew the course of the voyage of the steamship Chifuku Maru.

[fol. 64] The paper which you show me bearing the letterhead of the Bankers Trust Company, dated January 5th, 1921, marked "Plaintiffs' Exhibit 24 for identification," was seen by me on or about its date at our office. We have a file of correspondence produced purporting to have passed between Lamborn & Company and T. S. Southgate & Company; Lamborn & Company and Bankers Trust Company and Lamborn & Company and the defendant bank. Without referring to the contents of those papers I will state that those which are originals were received by Lamborn & Company at or about the date they bear, and that the carbon copies are copies of original letters sent to the addresses at or about the date therein state.

Note

Letter dated April 27th, 1920 from National Bank of Commerce of Norfolk, Va. to Lamborn & Company, is marked Plaintiffs' Exhibit 57 for identification.

Letter dated April 29, 1920 from Bankers Trust Company to Lamborn & Company, is marked Plaintiffs' Exhibit 58 for identification.

Carbon copy of letter from Lamborn & Company to National Bank of Commerce of Norfolk, Va., dated May 1, 1920, is marked Plaintiffs' Exhibit 59 for identification.

Carbon copy of letter from Lamborn & Company to T. S. Southgate & Company, no date, is marked Plaintiffs' Exhibit 60 for identification.

Copy of letter from Lamborn & Company to Bankers Trust Company, dated May 1, 1920, is marked Plaintiffs' Exhibit 61 for identification.

Letter from Bankers Trust Company to Lamborn & Company, dated May 3, 1920, is marked Plaintiffs' Exhibit 62 for identification.

Letter from T. S. Southgate & Company to Lamborn & Company, dated May 4, 1920, is marked Plaintiffs' Exhibit 63 for identification.

[fol. 65] Carbon copy of letter from Lamborn & Company to T. S. Southgate & Company, dated May 6, 1920, is marked Plaintiffs' Exhibit 64 for identification.

Telegram from T. S. Southgate & Company to Lamborn & Company, dated May 7, 1920, is marked "Plaintiffs' Exhibit 65 for identification.

Copy of telegram from Lamborn & Company to T. S. Southgate & Company, no date, is marked Plaintiffs' Exhibit 66 for identification.

Telegram from T. S. Southgate & Company to Lamborn & Company, dated May 10, 1920, is marked Plaintiffs' Exhibit 67 for identification.

Letter from T. S. Southgate & Company to Lamborn & Company, dated May 11, 1920, is marked Plaintiffs' Exhibit 68 for identification.

Letter from National Bank of Commerce of Norfolk, Va., dated May 11, 1920, to Lamborn & Company, is marked Plaintiffs' Exhibit 69 for identification.

Copy of letter of credit from the National Bank of Commerce of Norfolk, Va., to Lamborn & Company, dated May 11, 1920, is marked Plaintiffs' Exhibit 70 for identification.

Carbon copy of letter from Lamborn & Company to National Bank of Commerce of Norfolk, Va. dated May 14, 1920, is marked Plaintiffs' Exhibit 71 for identification.

Carbon copy of letter from Lamborn & Company to T. S. Southgate & Company, dated May 14, 1920, is marked Plaintiffs' Exhibit 72 for identification.

Letter from National Bank of Commerce of Norfolk, Va. to Lamborn & Company, dated May 15, 1920, is marked Plaintiffs' Exhibit 73 for identification.

Carbon copy of letter from Lamborn & Company to Bankers Trust Company, dated June 10th, 1920, is marked Plaintiffs' Exhibit 74 for identification.

[fol. 66] Carbon copy of letter from Lamborn & Company to National Bank of Commerce of Norfolk, Va., dated June 10, 1920, is marked Plaintiffs' Exhibit 75 for identification.

Carbon copy of letter from Lamborn & Company to T. S. Southgate & Company, dated June 10, 1920, is marked Plaintiffs' Exhibit 76 for identification.

Letter from Bankers Trust Company to Lamborn & Company, dated June 11, 1920, is marked Plaintiffs' Exhibit 77 for identification.

Carbon copy of letter from Lamborn & Company to Bankers Trust Company, dated June 15, 1920 is marked Plaintiffs' Exhibit 78 for identification.

Carbon copy of letter from Lamborn & Company to National Bank of Commerce, dated June 15, 1920 (two pages) is marked Plaintiffs' Exhibit 79 for identification.

Carbon copy of letter from Lamborn & Company to National Bank of Commerce of Norfolk, Va. dated June 18, 1920, is marked Plaintiffs' Exhibit 80 for identification.

Carbon copy of letter from Lamborn & Company to National Bank of Commerce of Norfolk, Va., dated July 9, 1920, is marked Plaintiffs' Exhibit 81 for identification.

Charles A. Godsell, being duly sworn and examined as a witness for the plaintiffs, testified as follows:

By Mr. McNevin:

I reside at Ridgefield Park, N. J., and am employed by Lamborn & Company, Inc., and was employed by them in the years 1920 and 1921. I was in charge of the importation of foreign sugars, that is making up contracts, and was familiar with the ships carrying sugar that Lamborn & Company had consigned to them. In the course of my work for the year 1920 I followed the voyage of the steamship [fol. 67] Chifuku Maru. Referring to the month of November, 1920, I obtained information from the Maritime Register, an issue of some date in November, of her voyage. I saw the copy of the New York Maritime Register dated

November 17th, 1920, marked for identification "Plaintiffs' Exhibit 48," and noted the article on page 13 of the Register which reads: "Chifuku Maru, Jap. S. S. London, November 15th. A telegram from Port Said states that the steamer Chifuku Maru from Colombo, etc., for Philadelphia has arrived there with high pressure cylinder and piston damaged. Repairs will require about seven days."

I knew at that time that the Chifuku Maru had sugar for Lamborn and Company, and I called the notice to the attention of the members of the firm. They then proceeded to ascertain the extent of the damage and how long she would be laid up, through the Comet Forwarding Company, ship brokers and forwarders. Prior to this time I had communicated by letter with T. S. Southgate & Company and the letter marked "Plaintiffs' Exhibit 49 for identification" is the carbon copy of a letter dated August 30th, 1920, addressed to T. S. Southgate & Company, Norfolk, Virginia. The initials "C. G." in the corner of that letter are mine.

The paper dated 9/20/20 marked "Plaintiffs' Exhibit 50 for identification" is a carbon copy of a letter dated September 29th, 1920, addressed to T. S. Southgate & Co., Norfolk, Va. The initials "C. A. G." in the upper right-hand corner are mine. I composed and dictated the original of which this purports to be a carbon copy. It was a part of my duties to declare to consignees the names of steamers carrying sugar.

Plaintiffs' Exhibit 51 for identification is a carbon copy of a letter dated November 10th, 1920, addressed to T. S. Southgate & Company, Norfolk, Va., prepared and signed by me. It contained correctly and accurately the information that I then had concerning the steamer Chifuku Maru at that time. I did not know of the accident to the Chifuku Maru. In fact the accident did not happen until after that date.

Plaintiffs' Exhibit 52 for identification, dated December 13th, 1920, is a carbon copy of a letter dated December 13th, 1920, addressed to T. S. Southgate & Company, Nor-
[fol. 68] folk, Va. I composed and signed the original of which this purports to be a copy and it correctly states the information which Lamborn & Company had concerning the vessels therein mentioned on that date. Between the time

that I prepared Plaintiffs' Exhibit 51 for identification and Plaintiffs' Exhibit 52 for identification, that is, between November 10th, 1920, and December 13th, 1920, I was familiar with the accident to the Chifuku Maru. At or about that time I was aware of the efforts to get information with regard to said steamer. I saw the paper dated November 17th, 1920, a few days after that time.

(Paper marked "Plaintiffs' Exhibit 53 for identification.")

The paper which you show me dated November 17th, 1920, was seen by me before December 13th.

(Paper marked "Plaintiffs' Exhibit 54 for identification.")

I don't think I saw the paper dated November 19th, 1920. I saw what purports to be a letter dated November 24th, 1920, shortly after that date and before December 13th.

(Paper marked "Plaintiffs' Exhibit 55 for identification.")

I did not see what purports to be a cablegram dated November 23rd, 1920, and have not seen it before today. A short time after its date I saw what purports to be a copy of a cable dated December 10th and marked received December 11th, probably about the 12th or 13th of the month.

(Paper marked "Plaintiffs' Exhibit 56 for identification.")

It was before I prepared and sent the letter which I have identified as Plaintiffs' Exhibit 52 for identification, dated December 13th, 1920.

[fol. 69] JOHN BOHAN, being recalled as a witness for the plaintiff, testified as follows:

By Mr. Bentley:

I saw the Chifuku Maru in Philadelphia, in the month of February 1921, during the first week in February that is, somewhere around the 4th.

Testimony for Defendant

A. E. WHARTON, being duly sworn, testified on behalf of the defendant as follows:

Examined by Mr Taylor:

My name is A. E. Wharton. I reside in the Baylor Apartment, Norfolk, Virginia, and am Cashier of the National Bank of Commerce.

In May 1920 I was assistant cashier of that Bank.

I prepared the original letter of credit that has been introduced in this suit, and signed the same as Assistant Cashier, and the credit established thereby was established as provided therein and on the terms and conditions therein contained.

Subsequent to the issuance of that letter of credit there was a modification of the same consisting of the elimination of the requirement of the ocean bill of lading. There has not been any other modification. The draft drawn against the letter of credit was not paid because our information was that the terms of the credit had not been complied with.

Whereupon the following question was asked:

Q. Why did you decline to pay it?

A. You want me to elaborate?

Q. Tell your reason in full to the jury?

A. We had information that the ship on which the sugar was tendered has been cleared from a port in Java to Port Said with option of New York, and at the last moment a diversion had been made in the ocean for Philadelphia. [fol. 70] We understood our terms of the credit were that the shipment was to be from Java to Philadelphia, and that was our reason for not paying.

We afterwards ascertained that our information on the subject was correct and acting on that information we declined payment. We were at all times ready and able and willing to pay that letter of credit in accordance with its terms and had no other interest in this matter except to live up to the letter of Credit.

Witness retired without cross examination.

D. M. THORNTON, being introduced on behalf of the defendant, and duly sworn, testified as follows:

Examined by Mr. Taylor:

My name is D. M. Thornton. I am thirty-four years old and reside at 1048 Cambridge Crescent, and am a salesman for T. S. Southgate & Company. I have been connected with that firm for eleven years and am a member of the firm. In May 1920 I was Sales Manager.

I originally placed the order with Lamborn & Company for 1,000 bags of Java sugar. The sugar was to be Java white sugar. The letter of credit sued on was procured at the instance of my firm and forwarded direct by the National Bank of Commerce to New York. It was issued in accordance with my request and I am familiar with its terms. There was a modification of the original terms consisting of the elimination of the ocean bill of lading. There was never any other modification or change in the letter of credit and the modification just spoken of was made at my instance and done with my approval.

It is a fact that the requirement of the contract with Lamborn and the letter of credit were identical. This is true as to the time and place and destination. As I have said it was issued at the instance of Southgate & Company and Southgate & Company agreed to the modification. We never agreed to any modification or departure from the terms of that letter of credit other than the modification as to the ocean bill of lading, and Southgate & Company never [fol. 71] received the sugar provided for in the letter of credit. No sugar was ever received pursuant to that letter of credit by Southgate & Company because the sugar tendered was not tendered in compliance with the terms of the letter of credit, in that the vessel was until two days prior to its arrival at Philadelphia, consigned to New York.

I am in general familiar with the usages and practice of ocean transportation, such being a part of my duties in connection with Southgate & Company. T. S. Southgate & Company was at all times ready, able and willing to take the sugar shipped in accordance with the letter of credit.

Witness retired without cross-examination.

Whereupon the defendant rests.

NOTE.—At this point it was stipulated by and between counsel that Plaintiffs' Exhibit No. 6 in evidence be withdrawn by consent of the court, and there be substituted therefor a true photographic copy thereof, bearing the same number. Such photographic copy was duly substituted.

The foregoing is the substance in narrative form of all of the evidence taken in this cause on behalf of both the plaintiffs and defendant, both in Court at the trial and by depositions, together with all exhibits referred to therein and introduced both in the trial in Court and with said depositions, the originals of which depositions, together with all the exhibits referred to, pursuant to agreement betwe-n the parties and in accordance with the rules and practice of this Court and of the United States Circuit Court of Appeals for the Fourth Judicial Circuit, are to be certified by the Judge of this Court and forwarded to the Clerk of the United States Circuit Court of Appeals for the Fourth Judicial Circuit at Richmond, to be used and considered upon the hearing of said cause on appeal.

MOTIONS FOR DIRECTED VERDICT AND RULING THEREON

Whereupon counsel for the plaintiffs moved the Court to direct the jury to find a verdict in favor of the plain-
[fol. 72] tiffs for the amount alleged in the notice of motion herein filed, and counsel for the defendant moved the Court to direct the jury to find a verdict for the defendant on the same grounds as urged in the motion to direct a verdict at the termination of the plaintiffs' evidence as heretofore set out.

Upon due consideration by the Court the motion by counsel for the plaintiffs to direct a verdict in favor of the plaintiffs was granted and the motion by counsel for defendant to direct a verdict in favor of the defendant was overruled.

Whereupon the defendant noted exceptions to these rulings.

Charge to Jury

The Court thereupon charged the jury as follows:

"Gentlemen of the jury, in the case we have been trying since yesterday, I have had the real issues in the case presented to me for my decision on the law. You gentlemen will recall that I told you a great many times during this court that the jury are the judges of the facts. Where there is a question of fact for which there is any occasion for determination or decision to reach the right of the case, that decision is exclusively one for the jury. Where the question involved is one of law, the responsibility is that of the court.

In this case, as I see it, there is no question of fact involved. The whole matter involved in the case is dependable upon the legal determination of the undisputed, admitted facts. That being true, gentlemen, after having heard the arguments of counsel at great length, I have concluded that the plaintiff in this case is entitled to a verdict for the full amount sued for, $48,009.81, and I am therefore compelled to instruct you to find a verdict for the plaintiff for that amount, with interest from the 7th day of January, 1921."

Verdict

Upon the completion of which charge the jury rendered their verdict in the words and figures following:

"We, the jury under the direction of the Court, find [fol. 73] for the plaintiffs and assess their damages at the sum of $48,009.81 with interest thereon from January 7, 1921.

R. P. Bunting, Foreman, this Nov. 20, 1923."

Motion to Set Aside Verdict and Order Overruling Same

And thereupon the defendant by counsel moved the Court to set aside the said verdict on the ground that the same

was contrary to the law and evidence and on the ground of error on the part of said Court in charging said jury and in directing a verdict for the plaintiffs as hereinabove set out, but the Court refused to grant the said motion of the defendant and overruled the same and proceeded to enter a judgment thereon, to which the defendant by counsel excepts and tenders this its bill of exceptions to said action of said Court in overruling its said motion to direct a verdict in favor of the defendant at the termination of the plaintiffs' evidence, and in overruling the defendant's motion to direct a verdict in favor of the defendant at the termination of all of the evidence and in directing a verdict in favor of the plaintiffs at the termination of all of the evidence, and prays that the same may be signed, sealed and made a part of the record, which is accordingly done, to have the same force and effect as to each of said exceptions as if each were set forth and contained in a separate bill of exceptions.

Given under my hand this 11th day of February, 1924.

D. Lawrence Groner, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER STAYING PROCEEDINGS—Filed February 11, 1924

The defendant, The National Bank of Commerce of Norfolk, a national banking association, having on the 11th day of February, 1924, filed its petition for a writ of error from the verdict and judgment made and entered herein, to the United States Circuit Court of Appeals for the Fourth Circuit, together with assignments of error, within due time, and also praying that an order be made fixing the amount of the security which the defendant should give and [fol. 74] furnish upon said writ of error, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals, and said petition having been duly allowed, now, therefore:

It is ordered, that upon said defendant's filing with the Clerk of this Court a good and sufficient bond in the sum of Fifty Thousand Dollars ($50,000.00) to the effect that if the said defendants and plaintiff in error shall prosecute the said writ of error with effect and answer all damages and costs if it fail to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by this Court, that all further proceedings of this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals.

D. Lawrence Groner, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed February 11, 1924

The defendant in this action, in connection with its petition for writ of error, makes the following assignments of error, in which it avers the Court erred:

1. The Court erred in failing to sustain the motion of the defendant to direct a verdict in its favor at the completion of the plaintiffs' evidence.

2. The Court erred in failing to sustain the defendant's motion to direct a verdict in its favor at the completion of all the evidence in the case.

3. The Court erred in sustaining the motion of the plaintiffs to direct a verdict in their favor upon the completion of all the evidence in the case.

[fol. 75] 4. The Court erred in refusing to grant the motion of the defendant to set aside the verdict in favor of the plaintiffs, rendered under the direction and order of the Court, and grant it a new trial, said motion having been seasonably made after the rendering of the verdict.

5. The Court erred in entering up judgment in favor of the plaintiffs on the verdict so rendered by the jury under its order and direction.

6. The Court erred in respect to the law applicable to and controlling the rights of the parties to this cause.

7. The Court erred in holding that the railroad bills of lading tendered in this case and upon which payment under the letter of credit was demanded, which showed a shipment of Java sugar was a compliance with the letter of credit, which provided for a shipment of Java white sugar.

8. The Court erred in its construction of the following provision of the letter of credit:

"Shipment to be made during August-September, 1920, at option of the sellers, from Java by steamer or steamers to Philadelphia;

its construction being to the effect that a shipment on the Steamship "West Cheswald," whose destination at the time of shipment was Port Said, option New York, and which after sailing from Port Said to New York was diverted at the instance of the plaintiffs on December 13th, 1920, to Philadelphia, was a compliance by the plaintiffs with the terms and provisions of said letter of credit.

9. The Court erred in holding that the plaintiffs, after having declared the "Chifuku Maru" as the vessel carrying the sugar which was the subject of the letter of credit sued on, had authority to subsequently declare another vessel, even though said other vessel complied in all particulars with the terms of the letter of credit so far as the [fol. 76] time, place and destination of the shipment was concerned, which said substituted vessel in this case did not comply with.

10. The Court erred in holding that the sugar actually tendered and which was shipped on the "West Cheswald" was so shipped during the months of August-September, 1920, as provided by the terms of the letter of credit, but the said questions should have been submitted to the determination of the jury under all the facts and circumstances of the case.

Wherefore, defendant prays that said verdict be set aside and said judgment be reversed.

Tazewell Taylor, Attorney for the National Bank of Commerce of Norfolk, Defendant in the Above entitled Action.

IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed February 11, 1924

It is stipulated and agreed between counsel for the plaintiff in error and counsel for the defendants in error that the Clerk of this Court shall make up a transcript of the record in this case and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Judicial Circuit at Richmond, Virginia, and that it be printed under the supervision of the Clerk of that Court in accordance with Rule 23.

It is further agreed that the transcript of record shall consist of the following papers:

1. Plaintiffs' notice of motion for judgment with all exhibits, if any, thereto attached;

2. Defendant's pleas with all exhibits, if any, thereto attached, and its statement of the grounds of defense;

[fol. 77] 3. Orders on trial, verdict and judgment of the Court;

4. Bills of Exception and assignments of error;

5. Petition for writ of error; order allowing writ of error, supersedeas bond, and writ of error, to be certified up as required by the rules of the United States Circuit Court of Appeals;

6. All exhibits received in evidence, or offered for identification, either in open court or with depositions, which are not embodied in the bills of exception, together with all stipulations between counsel, to be certified up by the Judge of this Court as original exhibits.

Tazewell Taylor, Counsel for Plaintiff in Error.
Baird, White & L., Counsel for Defendants in Error.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OF ORIGINAL PAPERS ACCOMPANYING TRANSCRIPT OF RECORD

(1) Petition for Writ of Error filed Feb. 11, 1924.

(2) Order allowing Writ of Error, Entered & Filed February 11th, 1924.

(3) Writ of Error dated February 11th, 1924. Copy of Writ of Error lodged for adverse party February 11, 1924.

(4) Citation dated February 11th, 1924. Service accepted.

(5) Appeal Bond, filed February 28th, 1924. Obligors The National Bank of Commerce of Norfolk, Va., Principal, and the American Surety Company of New York, Surety. Penalty $50,000.00. Condition for all damages and costs, etc.

[fol. 78] Clerk's certification to foregoing transcript omitted in printing.

[fol. 79] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 2231

THE NATIONAL BANK OF COMMERCE OF NORFOLK, Plaintiff in Error,

versus

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, Harry B. Hutchins, Clarence C. Troup, Karl E. Lindgren, George H. Logan, Victor R. Hess, N. Nelson Keen, B. Wheeler Dyer, and William V. Wood, Partners, Trading and Doing Business as Lamborn and Company, Defendants in Error

Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk

MINUTE ENTRIES

March 12, 1924, the transcript of record is filed and the cause docketed.

Same day, the original petition for writ of error, order allowing writ of error, writ of error, bond and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of Tazewell Taylor is entered for the plaintiff in error.

March 14, 1924, the appearance of Edward R. Baird, Jr., and H. G. Connor, Jr., is entered for the defendants in error.

Same day, the original exhibits (car records, etc.) are certified up.

March 29, 1924, twenty-five copies of the printed record are filed.

[fol. 80] Minute entry of argument and submission May 29, 1924, omitted in printing.

In United States Circuit Court of Appeals

[Title omitted]

(Argued May 29, 1924. Decided October 21, 1924.)

Opinion—Filed October 21, 1924

Before Woods, Waddill, and Rose, Circuit Judges

[fol. 81] Tazewell Taylor for Plaintiff in Error, and H. G. Connor, Jr., and Edward R. Baird, Jr., (Baird, White & Lanning; Van Doren, Conklin & McNevin; Louis O. Van Doren and Alfred C. B. McNevin on brief) for Defendants in Error.

Rose, Circuit Judge:

This is another sugar case. Those concerned in the transactions out of which it arose will be referred to as the Seller, the Buyer and the Bank. Only the first and last of these are parties to this litigation. The Seller was plaintiff below and is defendant in error here. It is a partnership trading as Lamborn & Co. and is composed of nearly a dozen persons, everyone of whom is a citizen of some other state than Virginia.

On the 23rd of April, 1920, it entered into a written contract with the Buyer, Southgate & Co. of Norfolk, Virginia, by the terms of which it sold the latter 1,000 bags of Java white sugar of about 224 pounds to the bag, 10% more or less at 22c per pound, duty paid, f. o. b. cars Philadelphia, landed weights. The sugar was to be shipped during

August/September at the option of Seller from Java, by steamer or steamers to Philadelphia. The names of such steamer or steamers were to be declared later. Should the steamer or steamers declare against the contract fail to arrive at the port of destination for any cause, Seller was to be relieved of responsibility under the contract. It was further provided that in case there was damage to the sugars in transit to Philadelphia preventing Seller from making full delivery, Seller was to deliver to each purchaser of sugar aboard that steamer a proportionate part of the sound packages. Payment was to be made net cash on presentation of sight draft with invoice and bill of lading attached. Buyer was to open within five days, confirmed irrevocable letter of credit in favor of Seller for the full invoice value of the 1,000 bags. If unforeseen circumstances, such as embargoes, Government supervision or interference, accidents, fires, strikes, car shortages, riots, stress of weather, etc. prevented shipment within the time specified, the Buyer had the option of cancelling the portion of the contract affected by the delay or taking the sugar [fol. 82] so affected for later shipment without claiming damages. The Buyer's decision was to be given immediately upon advice of the Seller that delay had occurred. In the event of such cancellation by the Buyer, the Seller was to be under no further obligation under the contract.

A letter of credit was promptly opened but because it was not worded in some respects as the Buyer and Seller desired, it was withdrawn and another dated May 11, 1920, was issued in its place by the Bank, the National Bank of Commerce of Norfolk, Virginia. It is upon this latter document that the Seller is here seeking to recover from the Bank. It was for $53,123.84, a sum arrived at by figuring what the Buyer would owe the Seller if the amount of sugar exceeded by the permissible 10% the 1,000 bags at 224 pounds each. In that event there would be delivered 246,400 pounds of sugar which at 22c per pound would foot up $54,208.00, from which by the terms of the contract, 2% or $1,084.16 would be deducted leaving the amount for which letter of credit was issued. Apparently when the letter was received by the Seller it did not notice that it contained the provision that before payment could be demanded by the Seller, the latter must present to the Bank or rather

to the Bankers Trust Co. of New York through which the credit was made payable, a sight draft with invoice and copy of ocean bill of lading covering shipment Java to Philadelphia and order notify bill of lading, the latter bill of course being the one to be issued by the railway carrier to whom in accordance with the contract the sugar was to be delivered f. o. b. cars at Philadelphia. In the contract the Seller had bargained to attach to the draft only the invoice and bill of lading, by which it understood the railroad bill. When the Seller realized that the letter of credit required it to present with its draft a copy of the ocean bill of lading as well, it took up the matter with the other parties, writing on the 10th of June that the sugar was being shipped from Java in cargoes of thousands of tons and as each cargo would include the sugars intended for a number of different purchasers, it would be impracticable to furnish to each of these a copy of the ocean bill of lading. Some correspondence ensued and finally on the 15th of July, the Bank notified the Seller that it had been authorized by the Buyer to eliminate the copy of the ocean bill [fol. 83] of lading covering shipment from Java to Philadelphia. It added that all other terms and conditions in the credit were to remain as theretofore. One of these other terms which consequently was unchanged was that which was headed "Shipment" and which reads as follows "Shipment to be made during August/September, 1920, at option of the Sellers from Java by steamer or steamers to Philadelphia." When in December the sugars arrived in Philadelphia and were put upon the cars and the Seller's draft was presented, the Bank refused payment. It says that it was entitled to do so because the sugars were not shipped from Java to Philadelphia.

There is no dispute as to facts. The controversy is as to the legal effect of that which admittedly took place. On the 30th of August, the Seller had notified the Buyer that the sugars were going forward by the Chifuku Maru or the Washington Maru or substitutes. Nearly a month later and within one day of the expiration of the time during which the Seller was bound to ship the sugar from Java, it wrote the Buyer that the Chifuku Maru was carrying the latter's sugars and was due to arrive the latter part of October. On November 10th, it again wrote the Buyer

that the sugars were to arrive in Philadelphia the last half of November on the Steamship Chifuku Maru. There was shipped in that steamer from Java to Philadelphia, a full cargo of sugar including much more than the amount which the Seller had contracted to deliver to the Buyer. Unfortunately the Steamship developed engine trouble of so serious a character, that it became evident that it might be forced to remain at Port Said for an indefinite period. The Seller had on board the Steamship West Cheswald sugars which before the end of September had been shipped on her from Java to New York. On the 11th of December that vessel was within about three days' sail of her destination. The price of sugar had by that time fallen to a fraction of that which the Buyer had agreed to pay and doubtless the Seller was anxious that there should be no departure on its part from the terms of the contract, and it might be that the Chifuku Maru would never get to Philadelphia. It occurred to the Seller that the West Cheswald might be diverted from New York to Philadelphia and accordingly on the 11th the Seller took up the matter with [fol. 84] the agents of that ship and asked whether such agents would consider the sending of her to Philadelphia instead of to New York. The reply was it would all depend on how the Seller's sugars were stored. A radiogram was thereupon sent to the master of the ship directing him to radio immediately amount general cargo and sugar aboard, how stored and if Lamborn's sugar could be discharged without moving other cargo. He replied that the Lamborn's sugar would be available without moving other cargo and must be discharged first, and added the ship was due to arrive about December 14th. At the time the ship was somewhere in the neighborhood of the Bermudas. The Shipping Board which was the owner of the West Cheswald was communicated with and asked if it would consider sending that ship to Philadelphia instead of New York. The Board authorized the diversion of the steamer to Philadelphia at an additional freight charge of $1.00 per ton and on the afternoon of December 13, the Seller accepted the Shipping Board's terms and agreed to pay $3,572.00 the extra freight on its sugars. Thereupon, on the 13th, the West Cheswald by radio was directed to proceed to Philadelphia. The ship reached the Delaware breakwater by

midnight of the 14th and apparently arrived at Philadelphia a few hours later.

The Courts, State and Federal, in at least four other cases, have had before them tenders, by this Seller, under similar contracts to that here involved, of sugars brought by the West Cheswald to Philadelphia. Wilbur vs. Lamborn, 276 Pa. State 479; Matthew Smith Tea, Coffee & Grocery Co. vs. Lamborn, 276 Fed. 325; Swift vs. Lamborn, 200 N. Y. Supp. 292; Williams Ice Cream Co. vs. Chase National Bank, 199 N. Y. Supp. 314, affirmed by the Appellate Division of the Supreme Court of New York for the First Department in June of this year, in an opinion which we have seen but which has not yet been reported. In every one of these, as well as below in the instant case, it was held the buyers were bound to receive and pay for the sugars. In most of them the question principally discussed was whether the Seller had the right under the contract to declare the West Cheswald as and when it did. The Buyers contended that letters of August 30, September 29 and November 10 from the Seller, identical in phraseology [fol. 85] with those of the same dates above referred to, amounted to a final declaration of the Chifuku Maru which could not be subsequently changed without the consent of both Buyer and Seller. That particular defense is not open to the Buyer in the instant case because its letter of credit contains no requirement for a declaration. Apparently the letters of credit procured by the buyers in the other litigated cases were equally silent on that point, a circumstance which doubtless explains why in them the controversy took the form either of an application by a buyer for an injunction to prevent payment on the letter of credit or of a suit by the buyer against the seller to recover what the latter had received upon such letter. The right of the Seller to declare the West Cheswald when and as it did was sustained by every one of the Courts which felt called to pass upon that question. It is not before us and we are not called upon to say anything about it.

In two of the cases, namely, Swift vs. Lamborn, supra, and Wilbur vs. Lamborn, supra, as well as by the learned judge below in the one now at bar, something was said as to the contention upon which we are required to pass, namely, whether the "shipment" of sugars on the West Cheswald was made "from Java by steamer or steamers

to Philadelphia." In the jurisdictions other than this, each of the Courts apparently felt that the answer it gave was so obviously correct as to require the support neither of discussion nor of authority.

In Williams Ice Cream Co. Inc. vs. Chase National Bank, the learned Judge in the Court of the first instance who heard the case thought it sufficient to say "the plaintiff urges the sugar was not a shipment from Java to Philadelphia, but to New York." "In other words the shipment is not the course that a designated vessel takes but the course it was intended it should take. This refinement it seems to me is more one of sophistry than reason and carries with it a failure of conviction." In the Appellate Division this particular point is not noticed at all. The Supreme Court of Pennsylvania in Wilbur vs. Lamborn was almost as brief. "Some point is made of the fact that the West Cheswald was originally bound for New York and diverted to Philadelphia. We think this diversion was of no consequence under the contract. Plaintiff was concerned only with the delivery of the merchandise and that there should be no delay in its arrival. It was delivered as the [fol. 86] result of a continuous voyage from Java to Philadelphia. These contracts did not say that the sugar shall be shipped by continuous voyage from the place of shipment to the destination, what they provide is that the shipment shall be from Java by steamer or steamers to Philadelphia. Even if they did so provide, we might not be prepared to hold—under the facts here appearing that the voyage was not in reality a continuous one—although the first destination of the ship was New York,—that this latter circumstance would avoid the contract." From the report of the case it appears that Filley vs. Pope, 115 U. S. 213, was cited by counsel but is not referred to by the Court. In the instant case the learned Judge below said "the letter of credit is complied with it seems to me by the shipment within a reasonable time, of course, from Java and the arrival within a reasonable time at Philadelphia. I cannot imagine that the contract contemplates or requires that there must have been all the time from the inception of the voyage, an intention and purpose to send the vessel to Philadelphia. If the intention occurred and was consummated by the act itself any time after the voyage commenced, it seems to me it would be in compliance with the

contract. It would be all that reason and fair play and justice would require. I was very much interested in the Supreme Court case and of course if it is parallel with this, I shall have to follow it and be bound by it, but I do see a difference in a shipment from Leith and a shipment from Glasgow. The delivery of this shipment to New York would have been unquestionably a non-compliance with the contract which would have avoided this letter of credit so the shipment of this sugar from some other point than Java would have been a non-compliance with the contract notwithstanding the precise quantity and the precise quality of sugar was furnished but to say that although the exact terms of the contract were complied with because it was not the purpose or not the intention or not the arrangement that what was done should be done at the beginning vitiated this guarantee, it seems to me is going farther than I think I have the right to go." The Supreme Court case referred to in the above quotation was of course, Filley vs. Pope, supra. In it a Scotch iron master by contract with a resident of St. Louis, sold the latter 500 tons of pig iron [fol. 87] and undertook that shipment should be from Glasgow as soon as possible. It appeared that the seller's iron works were about equally distant from Glasgow on the west coast of Scotland and from Leith on the east, and that in the ordinary course of trade, shipments were made indifferently from either. At the time of the sale, no vessel from Glasgow was immediately available and the only ship by which prompt transportation was possible was about to leave Leith. The seller accordingly put the iron upon her and it arrived at its destination earlier than it could possibly have done had it gone from Glasgow. The trial Court held that the provision "That the iron was to be shipped from Glasgow was not a material provision", "that the purpose of the contract was the sale" of a certain quantity of iron to be delivered at a certain place and that the fact "that it was shipped from Leith instead of Glasgow was not material to the rights of the parties." That point of view is in substance the same as that which has commended itself to the Courts which have heretofore passed upon the precise question now before us. They have thought that if within a reasonable time the sugar was carried to Philadelphia by a vessel which in fact sailed from Java to Phila-

delphia, it made no difference that when the shipment was made in Java, it was upon a ship which was bound on a voyage not to Philadelphia but on one to New York. In Filley vs. Pope, however, the Supreme Court held that the contract was a mercantile one, as that now at bar is, and that in such a contract "a statement descriptive of the subject matter or some material incident such as time or place of shipment is ordinarily to be regarded as a warranty or a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract."

Referring to the case of Norrington vs. Wright, 115 U. S. 188, decided on the same day, Mr. Justice Gray said that "the provision in that case related to the time; in this it relates to the place of shipment," as in the case now at our bar it related to the place to which the shipment was to be made. The Supreme Court said it was not "merely 500 tons of iron of a certain quality" that was sold, nor was "it such iron to be shipped as soon as possible from any Scotish port or ports, but it "was" iron of that quality [fol. 88] to be shipped from the particular port of Glasgow as soon as possible." "The Court has neither the means nor the right to determine why the parties in their contract specified shipment from Glasgow, instead of using the more general phrase of shipment from Scotland or merely shipment without naming any place, but it is bound to give effect to the terms which the parties have chosen for themselves. The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment nor does the buyer agree to accept iron shipped via any other port. The buyer takes the risk of delay in getting shipment from Glasgow or of delay or disaster in procuring the voyage from Glasgow to New Orleans, but he does not take the risk of delay or of sea perils which may occur in the course of a different voyage from Leith to the same destination."

"One or two illustrations may help to make this clear. If the sellers had shipped the iron at the first opportunity from Glasgow, the buyer could not have refused to accept it even if it could have been shipped sooner from Leith.

Again, the buyer would have an insurable interest in iron during the voyage by reason of the title which would accrue to him under the contract on arrival and delivery and of the profits that he might make in case of a rise in the market but a policy of insurance on the iron for a voyage from Glasgow would not cover a voyage from Leith." Just as in this case although the title to the sugar was not to pass until its delivery f. o. b. cars Philadelphia, the buyer had an insurable interest in it and had the sugar market continued to advance, he might well have desired to insure the gain he would make from his contract, and insurance affected on sugar from Java to Philadelphia would not have covered sugar on a ship bound for New York. Murray vs. Columbian Insurance Co., 4 Johns 443.

In the case before us the parties had definitely bargained for a "shipment" "from Java to Philadelphia," as in Filley vs. Pope they did for a shipment "from Glasgow." Some of the Courts which have upheld the contention of the Seller in cases arising out of sugars tendered from the West Cheswald have done so because in their view whether the shipment was to Philadelphia depended on [fol. 89] the voyage the ship actually made and not upon the one she started out to make and for which she issued her bills of lading. If they are right, they were of course justified in holding that Filley vs. Pope was not a controlling authority. The Bank, however, argues that in mercantile contracts such as this the word "shipment" has a definite meaning. When it is used in connection with the time or place at or the destination to which it is to be made, it has reference to the conditions which existed at and before the sailing of the ship and that therefore the sugar tendered under the letter of credit was a shipment not "to Philadelphia" but "to New York." If that be so, Filley vs. Pope is necessarily decisive of the controversy.

In Norrington vs. Wright, supra, the Supreme Court cited with approval Bowles vs. Shand, 2 App. Cases 455. In that case a contract was made in London, for the sale of 6,000 tons of Madras rice to be shipped at Madras or coast during the months of March and/or April, 1874, per Rajah of Cochin. The 6,000 tons filled 8,200 bags of which 7,120 were put on board and bills of lading signed in February and for the rest, consisting of 1,030 put on

board in February and 50 in March, the bill of lading was signed in March. The House of Lords held the seller could not require the buyer to accept the rice because the meaning of the contract, as apparent upon its face, was that all of the rice must be put on board in March and April or in one of those months. The shipment took place when the rice was put on board the ship and what was then done, determined the time and character of the shipment, precisely as whether the shipment of the sugar in the case at bar was made to New York or Philadelphia was necessarily determined when, the sugar being on board the ship, the bills of lading for it were issued.

In answer to a suggestion similar to one which seems to have had much weight with some of the Courts which have considered the contract now in controversy, viz, that it made no difference to the Buyer whether the sugar was originally consigned to New York or to Philadelphia, Lord Chancellor Cairns said, "it does not appear to me to be a question for your Lordships or for any Court to consider whether this is a contract which bears upon the face of it some reason, some explanation why it was made in that [fol. 90] form and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing in their contracts stipulations to which they do not attach some value and importance. If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace that literal meaning to say that it puts an additional burden on the seller without a corresponding benefit to the purchaser; that it is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers without any real cause would frequently obtain an excuse for rejecting contracts when prices have dropped. The non-fulfillment of any term of the contract is a means by which a purchaser is able to get rid of the contract when prices have dropped but that is no reason why a term which is in a contract should not be fulfilled." In the same case that eminent authority on the law of sale, Lord Blackburn said "if the description of the

article tendered is different in any respect it is not the article bargained for and the other party is not bound to take it. I think in this case what the parties bargained for was rice shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras; probably equally good rice might have been shipped in February as was shipped in April, and I dare say, equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin, but the parties have chosen, for reasons best known to themselves, to say we bargained to take rice shipped in this particular region, at that particular time, on board that particular ship and before defendants can be compelled to take anything in fulfillment of that contract, it must be shown not merely that it is equally good, but that it is the same article they have bargained for otherwise they are not bound to take it."

The same principle was applied by Lord Chief Justice Russell in Ashmore & Son vs. Cox & Co., L. R. 1899, 1 Q. B. 436. In that case 250 bales of Manila hemp were sold, ship-[fol. 91] ment to be made from a port or ports in the Philippine Islands by sailor or sailors direct or indirect to London, between May 1 and July 31. No hemp was shipped by the seller by sailor or sailors, nor during the time limited, but on September 15, it did ship 250 bales of Manila hemp by a steamship which was expected to arrive and did arrive in London about the same time as the sailing ship would have arrived, had it sailed July 31. It was held that the date of shipment and that it was to be made by a sailor or sailors was binding. In that case it was urged precisely as it has been at bar, that all the buyer was interested in was that goods of the kind and quality he had bargained for should arrive at the time and place originally contemplated.

Few men have been more deeply learned in mercantile law than Mr. Justice Scrutton. In Landauer vs. Craven & Speed Bros., L. R. 1912, 2 K. B., 94, he passed upon a case in which 500 bales of Manila hemp had been sold for delivery at London. The terms of the contract gave much liberty to the seller and by so doing indicated that the buyer was chiefly interested in the ultimate delivery of the hemp to him. It was agreed the shipment might be made from any recognized shipping port or ports in the

Philippine Islands or from Hong Kong or Singapore at any time within a three months interval between October 1 and December 31. The shipment might be direct or indirect. It was in fact made from Manilla in due season but on a bill of lading which called for delivery at Hong Kong. At the last named port, subsequently to December 31, the hemp was put upon another ship and there was issued for it a new bill of lading from Hong Kong to London. Mr. Justice Scrutton held that the seller was bound within the time named in the contract to ship at the port of shipment goods of the description contained in the contract and on shipment to procure a contract of affreightment under which the goods would be delivered at the destination contemplated by the contract. He said if when the seller ships goods sold C. I. F. London, he has no contract for carriage to London but only an intention to make one, he cannot forward this and tender an intention to the buyer. He further said that a seller C. I. F. must ship his goods under a contract for conveyance to the port of destination which can be transferred and not under a con-[fol. 92] tract for part of the way and to take another which cannot be transferred. Now it is true as it is pointed out by the learned counsel for the Seller that the contract here is not a C. I. F. contract but it is one under which the Buyer had an insurable interest and is therefore one which so far as this question is concerned is governed by the same principle. Moreover, at all events, Landauer vs. Craven & Speed is one of the many cases which hold that the character of the shipment is fixed at the time it is made, a principle which has received new and recent affirmation by the House of Lords in Hansson vs. Hamel & Horley, L. R. 1922, 2 App. Cases 36.

We in the past have had more than one occasion to hold that in mercantile contracts, the Courts must give effect to every term in the bargain the parties have chosen to make and are not at liberty to speculate whether they did or did not attach importance to something they wrote. As for example in the Manhattan, 284 Fed. 310, we accepted as settled law that a purchaser of grain to be shipped by one ship could not be required to take it if it came another and that we could not inquire whether every possible purpose of the buyer would not be as well served by that which was

brought in the substitute—From much which was said by the tribunals which have heretofore passed upon the obligation of buyers to accept sugar from the West Cheswald, it would seem that it is at least possible that their conclusions were influenced not a little by their natural desire to prevent on a rapidly falling market purchaser from escaping from a bad bargain by taking advantage of a variation from the terms from which they in fact cared nothing. Such considerations have much less weight in construing and enforcing the agreements of business men than the Courts may properly give to them when they are called upon to deal with contracts of a less strictly mercantile character. In this respect we can add nothing to what has been so forcibly said in the quotations made from Mr. Justice Gray in this country and from Lords Cairns and Blackburn in England. Our examination of the cases which in this country and across the water have put a definite interpretation on the meaning of the word "shipment" as used in contracts of the character of that with which we are [fol. 93] here concerned, has convinced us that the instant case is not distinguishable from them and is governed by what the Supreme Court there said.

It follows that the learned Court below erred in rejecting the prayer of the defendant for a directed verdict in favor and in consequence, the judgment below must be reversed and the case remanded for a new trial.

Reversed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—Filed October 22, 1924

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis- [fols. 94-99] trict Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the

United States for the Eastern District of Virginia, at Norfolk, with directions to set aside the verdict and grant a new trial in accordance with the opinion of this Court.

John C. Rose, U. S. Circuit Judge.

October 22, 1924.

Petition for Rehearing, covering six pages, omitted from this print. It was denied and nothing more by order December 20, 1924.

[fol. 100] In United States Circuit Court of Appeals

Minute Entry

November 20, 1924, petition of defendants in error for a stay of the mandate pending their petition for a rehearing filed.

In United States Circuit Court of Appeals

Order Staying Mandate—Filed November 24, 1924

Upon the Application of the defendants in error, by Baird, White & Lanning, their attorneys, and it appearing to the Court that a petition for rehearing has been presented by the defendants in error,

It is Ordered that the mandate of this Court in this cause *me*, and the same is hereby, stayed pending the action of the Court on said petition for a rehearing.

John C. Rose, Circuit Judge.

November 24, 1924.

In United States Circuit Court of Appeals

[Title omitted]

Order Denying Rehearing—Filed December 20, 1924

[fols. 101 & 102] This Court having at its October term, 1924, rendered its decision reversing the judgment of the

said District Court in this case, and the defendants in error having on November 20, 1924, presented to the Court a petion for a rehearing of the said case, and the same having been carefully considered,

It is now here ordered by this Court that the rehearing asked for be, and the same is hereby, denied at the cost of the defendants in error. Let mandate issue after the expiration of five days.

John C. Rose, U. S. Circuit Judge.

December 20, 1924.

In United States Circuit Court of Appeals

Minute Entry of Mandate

On another day, to-wit, December 27, 1924, the mandate of this Court in this case is issued and transmitted to the U. S. District Court at Norfolk, Va., in due form.

Same day, the original petition for writ of error, order allowing writ of error, and bond are returned to the Clerk at Norfolk, Va.

Same day, the original exhibits are returned to the Clerk at Norfolk, Va.

[fol. 103] [Caption omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

At Law. No. 3699

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, HENRY B. HUTCHINGS, CLARENCE G. TROUP, KARL E. LINDGREN, GEORGE H. LOGAN, N. NELSON KEEN, and B. WHEELER DYER, surviving partners, Trading and Doing Business as Lamborn & Company,

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA

NOTICE OF MOTION FOR JUDGMENT—Filed April 7, 1921

To the National Bank of Commerce of Norfolk, Norfolk, Virginia, a corporation chartered and existing under the laws of the State of Virginia, with its principal office and place of business in the city of Norfolk in said State:

Take notice that the undersigned will move the District [fol. 104] Court of the United States for the Eastern District of Virginia, at Norfolk, in its court room in said city of Norfolk, Virginia, on Monday, May 2, 1921, between the hours of 10:00 a. m. and 2:00 p. m. on that day, or as soon thereafter as it can be heard, for a judgment in its favor against you for the sum of Forty-eight Thousand and Nine Dollars and Eighty-one Cents ($48,009.81) with interest thereon from the 20th day of December, 1920, until paid, and the costs of this proceeding.

Said sum became and is due, owing and unpaid by the terms of a certain letter of credit number one hundred and five (105), dated May 11, 1920, issued or established by you in favor of the undersigned through the Bankers' Trust Company of New York, under the terms and conditions therein set forth, as modified and amended by a certain letter written, addressed and delivered by you to the undersigned, dated July 17, 1920, eliminating the requirements in respect to the copy of an ocean bill of lading in said letter set forth, the undersigned having sold and delivered

one thousand (1,000) bags of Java white sugar, of the net weight of two hundred and twenty-two thousand six hundred and eighty (222,680) pounds at twenty-two (22) cents per pound, duty paid, f. o. b. cars Philadelphia, Pennsylvania, landed weights, less two per cent duty, of the price of Forty-eight Thousand and Nine Dollars and Eighty-one Cents ($48,009.81), and having presented a sight draft with invoice and order notify bill of lading attached, all as required by the terms of said letter of credit, amended as aforesaid, and in all respects complied with, performed and fulfilled each and all of the obligations, conditions and requirements in said letter set forth upon the performance and fulfillment whereof the undersigned was by the terms of said letter of credit entitled to have paid by you to the undersigned the aforesaid sum, demand for the payment whereof has been duly made, and payment thereof has been refused and declined. The amount in controversy in this cause, exclusive of interest and costs, exceeds the sum of $10,000. You are a resident of the State of Virginia, and each of the undersigned is a resident of a state other than the State of Virginia.

Arthur H. Lamborn, a citizen of New Jersey; Gerard P. Tameling, a citizen of New York; Chas. C. [fol. 105] Riggs, a citizen of New Jersey; Henry B. Hutchings, a citizen of New Jersey; Clarence G. Traup, a citizen of New Jersey; Karl E. Lindgren, a citizen of Pennsylvania; Geo. H. Logan, a citizen of New Jersey; Victor R. Hess, a citizen of New York; N. Nelson Keen, a citizen of New Jersey; B. Wheeler Dyer, a citizen of New York; William V. Wood, a citizen of New Jersey; partners, trading and doing business as Lomborn & Company, by Baird, White & Lanning, Counsel.

In United States District Court

Denial of Liability and Plea of General Issue—Filed April 11, 1921

The said defendant, The National Bank of Commerce of Norfolk, by its attorney, comes and says that it did not

undertake or promise in the manner and form as the said plaintiffs have above hereof complained.

And of this the said defendant puts itself upon the country.

Tazewell Taylor, p. d.

IN UNITED STATES DISTRICT COURT

STATEMENT OF GROUNDS OF DEFENSE—Filed May 3, 1921

And now comes the defendant, the National Bank of Commerce of Norfolk, by counsel, and states that its grounds of defense upon which it will rely at the trial of the above entitled action are as follows:

1. That it denies each and every the allegations contained in the notice of motion for judgment filed herein.

2. That it relies upon each and every defense which may be made to the claims asserted by the plaintiffs as are properly provable under the general issue, and in that connection denies and calls for strict proof of each and every [fol. 106] item of the charge relied upon by the said plaintiffs.

3. It relies upon the fact that the plaintiffs failed to keep and perform the obligations of the contract which is the subject of this action, so far as the same were to be kept and performed by them.

Tazewell Taylor, p. d.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL STATEMENT OF GROUNDS OF DEFENSE—Filed October 23, 1923

And now comes the defendant, The National Bank of Commerce of Norfolk, by counsel, and states that its grounds of defense upon which it will rely at the trial of the above entitled action are as follows:

1. That it denies each and every allegation contained in the notice of motion for judgment filed herein.

2. That it relies upon each and every defence that may be made to the claims asserted by the plaintiffs as are properly provable under the general issue, and in that connection denies, and calls for strict proof of, each and every item of the charges relied upon by the said plaintiffs.

3. It relies upon the fact that the plaintiffs failed to keep and perform the obligations of the contract which is the subject of this action, so far as the same were to be kept and performed by them.

4. It relies upon the fact that the letter of credit, which is the subject of this action, contemplated the delivery by the plaintiffs of Java White Sugar, whereas the railroad bill of lading, together with other documents tendered by the plaintiffs and upon which payment under the letter of credit was demanded, did not show a shipment of Java White Sugar, but, on the contrary, simply Java Sugar there being at least fourteen varieties of Java Sugar.

[fol. 107] 5. It relies upon the fact that the letter of credit upon which this action is brought provides as follows:

"Shipment to be male during August-September, 1920, at option of the sellers, from Java by steamer or steamers to Philadelphia."

whereas, the fact is that the sugar tendered, in addition to not being of the character and quality designated in the letter of credit, was shipped on the Steamship "West Cheswald," whose destination at the time of shipment was Port Said, option New York, and which after sailing from Port Said to New York was diverted at the instance of the plaintiffs on December 13th, 1920, to Philadelphia, it thus being apparent that the sugar in said vessel was never shipped from Java to Philadelphia within the months of August-September, 1920, and its ultimate destination until December 13th, 1920, was New York and not Philadelphia.

6. It relies upon the fact that the plaintiffs having declared the "Chifuku Maru" as the vessel carrying the sugar which was the subject of the letter of credit sued on, had no authority to subsequently declare another vessel, even though said vessel complied in all particulars with the terms of the letter of credit so far as the time, place and destina-

tion of the shipment was concerned, which said substituted vessel in this case did not comply with.

7. It relies upon the fact, in addition to all of the other defences hereinabove made, that the sugar actually tendered was not shipped on the "West Cheswald" during the months of August-September, 1920.

Tazewell Taylor, p. d.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO AMEND NOTICE OF MOTION FOR A JUDGMENT—Filed November 19, 1923

On motion of the plaintiffs, leave is given them to amend the notice of motion for a judgment herein, and the same is accordingly amended so that said motion shall contain the [fol. 108] averment that the National Bank of Commerce of Norfolk is chartered under the National Banking Laws of the United States, instead, as alleged in the notice of motion for a judgment, under the laws of the State of Virginia.

D. Lawrence Groner, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO AMEND NOTICE OF MOTION FOR JUDGMENT, WITHOUT PREJUDICE, ETC.—Filed February 23, 1925

This day came the parties, by counsel, and on motion of the plaintiffs leave is given them to file their amended notice herein, and to which motion said defendants objected on the ground that the same undertakes to vary and contradict the terms of a valid written instrument as construed by the Circuit Court of Appeals in this case, to the overruling of which defendants excepted, and the same is accordingly filed, and the said original notice amended by putting a period after the words,

"Less two per cent duty, of the price of Forty-Eight Thousand and Nine Dollars and Eighty-One Cents

($48,009.81), and having presented a sight draft with invoice and order notify bill of lading attached, all as required by the terms of said letter of credit amended as aforesaid"

and inserting the words,

"That by the words in said letter of credit dated May 11, 1920, 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.' the parties—you and the undersigned—herein meant and intended, and you understood that the said 1,000 bags of sugar were to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or Sep- [fol. 109] tember, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to T. S. Southgate & Co. was to be made by placing the said 1,000 bags free on board railroad cars at Philadelphia, and that the title and property right in said goods remained in Lamborn & Company, the undersigned, until said delivery at Philadelphia to T. S. Southgate & Co.

That at all the times herein mentioned there existed a well known, long established and generally recognized custom among importers and buyers and sellers of imported sugars wherein and whereby the expression: 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.' meant and intended, and was understood as meaning and intending that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to the purchasers was to be made by placing the sugar free on board railroad cars at Philadelphia, Pa., and that the title and property right remained in the sellers until said delivery to the buyers at Philadelphia, Pa.; and that said words did not mean nor require that the vessel or the goods carried thereon be at the time of shipment destined for Philadelphia, Pa."

By striking out the word "and" and inserting the words "that the undersigned"
before the words,

"In all respects complied with, performed and fulfilled each and all of the obligations, conditions and requirements in said letter set forth"

and by inserting after the words

"Demand for the payment whereof has been duly made, and payment whereof has been refused and declined"

[fol. 110] the words,

"Since the commencement of this action Victor R. Hess has withdrawn from the firm of Lamborn & Company, and William D. Wood has departed this life, and the surviving partners are those named in the notice originally filed herein, other than the said Victor R. Hess and William D. Wood."

before the words,

"The amount in controversy in this cause, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00)."

This order is entered without prejudice to the rights of the defendants to move to strike out or to take any other proper action they may be advised as to the amended notice of motion as filed.

D. Lawrence Groner, United States District Judge.

In United States District Court

Amended Notice of Motion for Judgment—Filed February 16, 1925

To the National Bank of Commerce of Norfolk, Virginia, a corporation chartered and existing under the laws of the United States of America as a banking corporation, with its principal office and place of business in the city of Norfolk, Virginia:

Take Notice that the undersigned will move the District Court of the United States for the Eastern District of Vir-

ginia, at Norfolk, in its court room in said City on Monday, the 4th day of May, 1925, between the hours of 10:00 a. m. and 2:00 p. m., or as soon thereafter as they can be heard, for a judgment in their favor against you for the sum of Forty-eight Thousand and Nine Dollars and Eighty-one Cents ($48,009.81) with interest thereon from the 20th day of December, 1920, until paid, and the costs of this proceeding.

Said sum became and is due, owing and unpaid by the terms of a certain letter of credit number one hundred and [fol. 111] five (105), dated May 11, 1920, issued or established by you in favor of the undersigned through the Bankers' Trust Company of New York, under the terms and conditions therein set forth, as modified and amended by a certain letter written, addressed and delivered by you to the undersigned, dated July 17, 1920, eliminating the requirements in respect to the copy of an ocean bill of lading in said letter set forth, the undersigned having sold and delivered one thousand (1,000) bags of Java white sugar, of the net weight of two hundred and twenty-two thousand six hundred and eighty (222,680) pounds at twenty-two (22c) cents per pound, duty paid, f. o. b. cars Philadelphia, Pennsylvania, landed weights, less two per cent duty, of the price of Forty-eight Thousand and Nine Dollars and Eighty-one Cents ($48,009.81) and having presented a sight draft with invoice and order notify bill of lading attached, all as required by the terms of said letter of credit amended as aforesaid.

That by the words in said letter of credit dated May 11, 1920, "F. O. B. cars Philadelphia, Pa., landed weights, shipments to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa." the parties—you and the undersigned—herein meant and intended, and you understood that the said 1,000 bags of sugar were to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to T. S. Southgate & Co. was to be made by placing the said 1,000 bags free on board railroad cars at Philadelphia, and that the title and property right in said

goods remained in Lamborn & Company, the undersigned until said delivery at Philadelphia to T. S. Southgate & Co.

That at all the times herein mentioned there existed a well known, long established and generally recognized custom among importers and buyers and sellers of imported sugars wherein and whereby the expression "F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.," meant and intended, and was understood as [fol. 211] meaning and intending, that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to the purchasers was to be made by placing the sugar free on board railroad cars at Philadelphia, Pa.; and that the title and property right remained in the sellers until said delivery to the buyers at Philadelphia, Pa., and that said words did not mean nor require that the vessel or the goods carried thereon be at the time of shipment destined for Philadelphia, Pa.

That the undersigned in all respects complied with, performed and fulfilled each and all of the obligations conditions and requirements in said letters set forth, upon the performance and fulfillment whereof the undersigned was by the terms of said letter of credit entitled to have paid by you to the undersigned the aforesaid sum, demand for the payment hereof has been duly made, and payment whereof has been refused and declined.

That since the commencement of this action Victor R. Hess has withdrawn from the firm of Lamborn & Company, and William D. Wood has departed this life, and the surviving partners are those named in the notice originally filed herein, other than the said Victor R. Hess and William D. Wood.

The amount in controversy in this cause, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000.00) Dollars.

You are a resident of the State of Virginia, and each of the undersigned is a resident of a State other than the State of Virginia.

Arthur H. Lamborn, a citizen of the United States and a resident of the State of New Jersey; Gerard P. Tameling, a citizen of the United States and a resident of the State of New York; Charles C. Riggs, a citizen of the United States and a resident [fol. 113] of the State of New Jersey; Henry B. Hutchings, a citizen of the United States and a resident of the State of New Jersey; Clarence C. Troup, a citizen of the United States and a resident of the State of Illinois; Karl E. Lindgren, a subject of the King of Sweden and a resident of the State of Pennsylvania; George H. Logan, a subject of the King of Great Britain and a resident of the State of New Jersey; N. Nelson Keen, a citizen of the United States and a resident of the State of New Jersey; B. Wheeler Dyer, a citizen of the United States and a resident of the State of New York, surviving partners of the co-partnership firm of Lamborn & Company, by Baird, White & Lanning, Counsel.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO STRIKE—Filed February 25, 1925

Comes now the defendant above named, by Tazewell Taylor, its counsel, and moves the Court that an order be entered herein requiring the plaintiffs to strike the following portions of the amended notice of motion for judgment herein, for the respective reasons hereinafter mentioned:

1. That portion of said amended notice of motion for judgment reading as follows:

"That by the words in said letter of credit dated May 11, 1920, 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers

to Philadelphia, Pa., the parties—you and the undersigned—herein meant and intended, and you understood [fol. 114] that the said 1,000 bags of sugar were to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to T. S. Southgate & Co. was to be made by placing the said 1,000 bags free on board railroad cars at Philadelphia, and that the title and property right in said goods remained in Lamborn & Company, the undersigned, until said delivery at Philadelphia to T. S. Southgate & Co."

for the reason that the terms of the said letter of credit are in writing and fully and completely set out the contract of the parties and cannot be added to, subtracted from, varied or contradicted by any alleged meaning or intention of said parties, nor by contemporaneous parol evidence, and for the further reason that the said language has been passed upon by the United States Circuit Court of Appeals of the Fourth Circuit on writ of error in this cause, and the meaning and intention of such language has been fully interpreted and defined in the opinion of said Court and its order therein entered, in a manner contrary to that alleged as the meaning and intention of the parties in said amended notice of motion for judgment.

2. That portion of said amended notice of motion for judgment reading as follows:

"That at all the times herein mentioned there existed a well known, long established and generally recognized custom among importers and buyers and sellers of imported sugars wherein and whereby the expression: 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.' meant and intended, and was understood as meaning and intending that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter

to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to the purchasers was to be made [fol. 115] by placing the sugar free on board railroad cars at Philadelphia, Pa., and that the title and property right remained in the sellers until said delivery to the buyers at Philadelphia, Pa.; and that said words did not mean nor require that the vessel or the goods carried thereon at the time of shipment destined for Philadelphia, Pa."

for the reason that the terms of the said letter of credit are in writing and fully and completely set out the contract of the parties and are in no sense ambiguous and cannot be added to, subtracted from, varied or contradicted by any alleged meaning or intention of said parties, nor by contemporaneous parol evidence, and for the further reason that the said language has been passed upon by the United States Circuit Court of Appeals of the Fourth Circuit on writ of error in this cause, and the meaning and intention of such language has been fully interpreted and defined in the opinion of said Court and its order therein entered, in a manner contrary to that alleged as the meaning and intention of the parties in said amended notice of motion for judgment; for which reason the said plaintiffs cannot rely upon any custom among importers and buyers and sellers of imported sugars so far as said custom is contrary to the general law applicable to this case, which said general law has been declared by the said United States Circuit of Appeals on writ of error in this cause as above alleged; and also for the further reason that said paragraph undertakes to allege that the said words did not mean or require that the vessel or the goods carried therein be at the time of shipment destined for Philadelphia, Pa., which said Circuit Court of Appeals on the writ of error aforesaid had expressly declared to be the meaning and requirement thereof.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING MOTION OF DEFENDANT TO STRIKE—June 4, 1925

This day came again the parties and the defendant's mo- [fol. 116] tion to require the plaintiffs to strike out cer-

tain portions of the allegations contained in the amended notice of motion heretofore filed herein having been fully argued, the Court doth sustain said motion, to which action and ruling of the Court the plaintiffs, by counsel, excepted.

D. Lawrence Groner, U. S. District Judge.

Norfolk, Virginia.

IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT AND JUDGMENT—Filed June 5, 1925

This day came again the parties, by their attorneys, and the issue having been heretofore made up herein, thereupon from the jurors duly drawn and in attendance upon the Court came a jury of twelve, to-wit: E. J. White, J. B. Morgan, W. R. Bassett, J. M. Marshall, L. A. Kee, V. B. Sturtevant, E. P. Huffman, C. C. Foreman, Tapley Portlock, C. W. King, M. J. Eaton, and S. C. Phillips, and who having been as aforesaid duly elected and tried were sworn well and truly to try the issue joined, and at the conclusion of the evidence on behalf of the plaintiffs the defendant, by its counsel, moved the Court to direct a verdict in its favor, which motion the Court doth sustain, to which action of the Court the plaintiffs, by their counsel, excepted. Thereupon the jury, under direction of the Court, returned the following verdict, to-wit: "We, the jury, upon the issue joined, under the direction of the Court, find for the defendant, this 5th day of June, 1925, J. B. Morgan, Foreman." Thereupon the plaintiffs, by their counsel, moved the Court to set aside verdict and grant them a new trial upon the ground that said verdict is contrary to law and the evidence and for misdirection of the jury by the Court, which [fol. 117] motion being fully argued the Court doth overrule, to which action of the Court the plaintiffs duly excepted. Whereupon it is considered by the Court and so ordered that the plaintiffs take nothing by their bill, but for their false clamor in mercy pray, etc., and that the defendant go hereof without day, and recover against the plaintiffs its costs by it about its defense in this behalf ex-

pended. And thereupon the plaintiffs, by their counsel, having intimated an intention to apply for a writ of error of and to the judgment aforesaid, leave is granted them to file their bill of exceptions within eighty-five days from this date.

D. Lawrence Groner, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ORDER FILING BILLS OF EXCEPTION—Filed August 26, 1925

This day came the plaintiffs, by their attorneys, Baird, White & Lanning, and in pursuance of the leave heretofore granted them, tendered their bills of exceptions, consisting of three certificates of exceptions numbered one, two and three, which were received and considered by the Court, and ordered to be made a part of the record.

D. Lawrence Groner, U. S. D. J.

IN UNITED STATES DISTRICT COURT

Plaintiffs' Certificate of Exceptions No. 1—Filed August 26, 1925

The Court certifies that upon the trial of this cause the plaintiffs offered in evidence the following (a) written papers, documents, correspondence, etc., (b) oral testimony and depositions, put into narrative form, and (c) agreements and stipulations together with the exhibits attached to the testimony and stipulations, and that after the introduction of the aforesaid evidence the defendant moved the Court to direct the jury to return a verdict for the defendant whereupon, after argument, the Court sustained said motion and directed the jury, and it returned a verdict [fol. 118] for the defendant, in the following words and figures, to-wit:

"We, the jury, upon the issue joined, under the direction of the court, find for the defendant this 5th day of June, 1925.

J. B. Morgan, Foreman."

to which action, direction and ruling of the Court, at the time of said action, direction and ruling, the plaintiffs excepted and tendered this their third certificate of exceptions which they pray may be signed, sealed and made a part of the record, and the same is done accordingly, within the time prescribed by law and the rules and practice of this Court.

And the Court further certifies that the aforementioned: (a) written papers, documents, correspondence, etc. (b) oral testimony and depositions put into narrative form, and the exhibits attached thereto, and (c) agreements and stipulations, are as follows:

[Title omitted]

Before Hon. D. Lawrence Groner, Norfolk, Virginia, June 4, 1925

Present: Messrs. Baird, White & Lanning (Mr. Edward R. Baird, Jr., and Mr. R. Clarence Dozier), and Messrs. H. G. Connor, Jr., Louis O. Van Doren and Alfred C. B. McNevin for the plaintiff; Messrs. Tazewell Taylor and Tazewell Taylor, Jr., for the defendant.

Opinion on Motion to Strike

Mr. Taylor: Your Honor will doubtless recall perhaps that two months ago there was a motion made on behalf of the defendant in this case to strike certain portions of the allegations from the notice of motion. That was argued at [fol. 119] some length before your Honor but no disposition has as yet been formally made of it.

The Court: I think, gentlemen, that I might as well express my views of this matter now because the views that I have are not wholly matters of first impression. The same question which I have just heard argued was submitted by local counsel some two or three weeks ago and the impression that I had at that time and the conclusion that I arrived at has been rather, if anything, strengthened by such reflection as I have been able to give the subject in the interim. The motion is to amend the plaintiffs' pleadings by an additional allegation that the terms of the contract embracing the obligation of the seller are susceptible of construc-

tion different from the construction applied by the Circuit Court of Appeals by reason of a custom and by reason of the existence in the trade of a different meaning than that applied by the Circuit Court of Appeals. I, of course, concede that an amendment to a pleading may be made after a case has gone to the Circuit Court of Appeals and sent back for a new trial, perhaps with the same liberality that it could have been made if offered at the time of the original trial or prior to the original trial and I concede also, of course, that when a case has been sent back for a new trial new evidence may be introduced which may make an entirely different case than the case made on the first appeal. I think perhaps it is allowable to a plaintiff, unless the change proposed creates an entirely new and different cause of action, to amend its pleadings as a matter of law, setting up perhaps additional grounds for recovery, and that that is wholly and entirely permissible after the case has been heard on appeal, but as I understand the rule, it is that when once a question involving the interpretation of a written instrument has been submitted to the court and the court has determined the meaning of the instrument, that determination becomes the law of the case and adheres throughout the entire life of the case.

The Circuit Court of Appeals in this case, in a very elaborate opinion, has decided the meaning of the precise language in the contract that is now sought to be construed differently by virtue of proof of custom or intent. The effect of allowing an amendment of this kind at this time would be, if it were sustained by proper evidence, to have a case in which the Circuit Court of Appeals had construed [fol. 120] an instrument, a contract of sale, in which they had found no ambiguity, no difficulty in determining the precise and exact meaning of the parties and had finally concluded what the parties themselves meant and intended by the contract, and having that determination before me, to find that it meant something entirely different, that its language was not plain and unambiguous, that there was something about it so obscure that it required the introduction of evidence of a custom to determine what it did mean and finally determining that it meant something different from what the Circuit Court of Appeals had decided, would

be a thoroughly anomalous condition of affairs. Hence it seems to me that to allow this amendment to be made now would be a purely idle thing, a useless thing since in the very nature of things when the evidence to support it came to be introduced an objection would be made on the ground of its inadmissibility because the instrument speaks for itself, doesn't require the aid of custom to interpret it and would, therefore, have to be overruled and refused admission on that account.

I think if this were an original motion, that is to say, if this pleading had been in the shape in which it now is when it was first filed and this motion had been made to reject on the ground that the court could see by an inspection of the contract attached to the pleadings that it did not require any extraneous facts or circumstances or testimony to determine its meaning, that I should have overruled the motion and reserved the question upon the admissibility of the evidence, but since the avowed purpose of this amendment now and the only purpose is to furnish a foundation upon which evidence may be offered to justify a construction of the contract, the agreement between the parties, so that the agreement may be interpreted to mean what the Circuit Court of Appeals has solemnly declared it does not mean, would, I think, be just a waste of everyone's time.

Whatever my views may be of the right of the case, I am, of course, constrained by the decision of the Circuit Court of Appeals to assent to its conclusion. Its conclusion is that the term "shipment" meant that this sugar should be loaded on a ship in Java, destined for Philadelphia, and that what actually happened in this case is not a compliance with the terms of that agreement. What the amendment seeks to do is to determine by evidence of custom and the [fol. 121] generally accepted trade meaning, that the Circuit Court of Appeals is wrong in its determination of the terms of that agreement, and that what was done in this case was within the terms. To admit evidence of that kind in the face of its decision that the agreement means and only means what they say it means, that there is no ambiguity, no hidden or undetermined meaning, that it is plain, easily susceptible of construction, and as construed means what

they hold it to mean, leaves me, it seems to me, no option but to say that so far as the construction of the paper itself is concerned, that question is determined finally and whether I agree with it or not as an individual, as a court I am obliged to give effect and force to it and hence my conclusion is that the motion to reject should be sustained and when the evidence taken under the amendment and in support of the amendment is offered, I shall be constrained also to sustain the objection to its admissibility.

Mr. Van Doren: Your Honor will allow us an exception to your Honor's ruling.

At 5:15 P. M. court adjourned until 10 o'clock A. M., June 5, 1925.

Norfolk, Virginia, June 5, 1925.

Mr. Van Doren: Will the defendant stipulate that Lamborn & Company is a co-partnership and since that contract Hess has withdrawn and Wood has died?

Mr. Taylor: Yes.

Mr. Van Doren: We ask the defendant to stipulate that the defendant is a national bank.

Mr. Taylor: It is organized under the laws of the United States with its principal office in this city.

The plaintiffs offered in evidence letter of credit dated May 11, 1920, marked Plaintiffs' Exhibit No. 23. This paper was read by Mr. Van Doren and following is a copy thereof:

[fol. 122] PLAINTIFFS' EXHIBIT #23

The National Bank of Commerce

Letter of Credit No. 105

Norfolk, Virginia, May 11, 1920.

Lamborn & Company, 132 Front St., New York:

We are establishing a credit in your favor through the Bankers Trust Company of New York under terms and conditions stipulated below.

Opened by: T. S. Southgate & Company, Norfolk, Va., in favor of Lamborn & Company, 132 Front St., New York.

Amount: Fifty-three thousand, One Hundred twenty-three Dollars and eighty-four cents ($53,123.84).

Covering: 1,000 Bags (of about 224 lbs. each) 10 per cent more or less Java White Sugars at 22 cents per pound, less 2% duty paid f. o. b. cars, Philadelphia, Pa., landed weights.

Documents: Sight draft with invoice and copy of Ocean Bill of Lading covering shipment Java to Philadelphia, and Order Notify Bill of Lading attached.

Shipment: Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia.

Credit in force: January 31, 1921.

This is to be regarded as an irrevocable credit. If im- [fol. 123] possible to comply with the conditions above stated, communicate with us before making shipment. The conditions embodied in this credit must be adhered to, otherwise payment will not be effected.

Yours very truly, (Signed) A. E. Wharton, Assistant Cashier."

The plaintiffs offered in evidence a letter from the National Bank of Commerce to the Bankers Trust Company, dated July 15, 1920, and marked Plaintiffs' Exhibit No. 27. This paper was read by Mr. Van Doren, and the following is a copy thereof:

PLAINTIFF'S EXHIBIT #27

THE NATIONAL BANK OF COMMERCE

Foreign Exchange Dept.

Norfolk, Virginia, July 15, 1920.

The Bankers Trust Co., New York City.

GENTLEMEN: We beg to revert to our letter of credit No. 105 dated May 11th in favor of Messrs. Lamborn & Co. for $53,123.84, and to say that we have been authorized by our clients, Messrs. T. S. Southgate & Co. to eliminate the re-

quirement of the copy of ocean bill of lading covering shipment from Java to Philadelphia. All other terms and conditions in the credit to remain as heretofore.

We will be pleased to have you advise Messrs. Lamborn & Co. that this requirement had been eliminated.

Yours very truly, (Signed) A. E. Wharton, Ass't Cashier.'

[fol. 124] The plaintiffs offered in evidence a letter from the National Bank of Commerce to Lamborn & Company, dated July 17, 1920, marked Plaintiffs' Exhibit No. 47. This paper was read by Mr. Van Doren and the following is a copy thereof:

"PLAINTIFFS' EXHIBIT #47

THE NATIONAL BANK OF COMMERCE

Norfolk, Virginia, July 17, 1920.

Messrs. Lamborn & Co., New York City.

GENTLEMEN: Reverting to your letter of July 9th, we would advise that we have requested the Bankers Trust Co. of New York to eliminate requirement in our Credit No. 105 for copy of ocean bill of lading covering shipment from Java to Philadelphia. We have requested the Bankers Trust Co. of New York to notify you of the elimination of this requirement.

Yours very truly, (Signed) A. E. Wharton, Ass't Cashier."

The plaintiffs offered in evidence a letter dated July 16, 1920, from Bankers Trust Company to Lamborn & Company, marked Plaintiffs' Exhibit No. 28. This paper was read by Mr. Van Doren, and the following is a copy thereof:

"Plaintiffs' Exhibit #28

The Bankers Trust Company, New York

July 16, 1920.

Messrs. Lamborn & Company, 132 Front Street, New York City.

[fol. 125] Gentlemen:

Re credit No. 105, dated May 11th, in your favor, issued by National Bank of Commerce, Norfolk, Va.

We refer to your letters of June 10th and 15th on this subject and now advise you that we have received a letter from the National Bank of Commerce, Norfolk, Va., stating that they have been authorized by their clients, T. S. Southgate & Co. to eliminate the requirement of an ocean bill of lading showing shipment from Java to Philadelphia, of which please take note.

All other terms and conditions of this credit are to remain unchanged.

Very truly yours, (Signed) C. F. Born, Asst. Manager."

The plaintiffs offered in evidence contract between Lamborn & Company and Nederlandsche Maatschappy Voor Overzee Handel, marked Plaintiffs' Exhibit No. 44. This paper was read by Mr. Van Doren, and the following is a copy thereof:

"Plaintiffs' Exhibit 44

April 9th, 1920.

Buyer: Lamborn & Company, 132 Front Street, New York City.

Seller: Nederlandsche, Maatschappy Voor Overzee Handel, The Hague, Holland.

Contract

Lamborn & Company, have this day bought, Nederlandsche Maatschappy Voor Overzee Handel, have this day sold,

an even quantity of Two Thousand (2,000) short tons of two thousand (2,000) pounds each, of White Java Sugars guaranteed under twenty-five (25) Dutch Standard or [fol. 126] above, for shipment from Java during June and/or July, 1920, at seller's option, at a price of Fifteen Dollars and Twenty-five Cents ($15.25) per hundred pounds, c. i. f. New York.

Lamborn & Company, have this day bought, Nederlandsche Maatschappy Voor Overzee Handel, have this day sold, an even quantity of Five Thousand (5,000) short tons of two thousand (2,000) pounds each, of White Java Sugars guaranteed number twenty-five (25) Dutch Standard or above, for shipment from Java during September, 1920, at a price of Fourteen Dollars and Seventy-five Cents ($14.75) per hundred pounds, c. i. f. New York.

Insurance to be covered free of particular average unless amounting to One Hundred Dollars ($100). War risk also to be covered.

Payment—Buyers will open confirmed irrevocable credit in New York for ninety-five per cent (95%) of the value of the merchandise, when steamers are named, against which credit the Sellers will draw with full sets of documents attached, sixty days sight acceptance draft.

On account of misunderstanding as to whether net certified shipping weights or actual net landed weights are to apply as a basis of final settlement, this matter is left open for settlement after Mr. Baarslag has taken the matter up by cable with his principals, and should it be decided that shipping weights are to apply, the credit is to be for one hundred per cent (100%).

Packing to be as customary, which we understand is in burlap bags of about two hundred and twenty-four (224) pounds each.

C N C F O T No. 2.

Accepted

Lamborn & Co., by B. W. Dyer."

Plaintiffs offered in evidence a document marked Plaintiffs' Exhibit 45, dated April 12, 1920, constituting purchase and sale contract between Lamborn & Company of

[fol. 127] New York and Messrs. C. Czarnikow, Ltd. of London, for the purchase of five thousand long tons, ten per cent more or less of White Java sugar, shipment to be made during August and September, 1920, at seller's option by steamer or steamers to New York or Philadelphia or Boston or Baltimore at buyer's option, port to be declared immediately, another c. i. f. contract.

This paper was read by Mr. Van Doren and following is a copy thereof:

"PLAINTIFFS' EXHIBIT 45

Contract No. AB-522

New York, April 12th, 1920.

To Messrs. Lamborn & Company, New York:

We have this day sold to you for account of Messrs. C. Czarnikow, Ltd., London, five thousand (5,000) Tons of 2,240 lbs. 10% more or less if complete cargo, otherwise exact quantity, white Java sugars, packed in bags of about two cwt. each. Sound packages only to be delivered.

At ninety-eight (98/-) Shillings cost, freight and insurance to cover particular average (insurance invoice plus 2%) per cwt. of 11 pounds, net landing weights telquel.

Shipment to be made during August/September, 1920, at sellers option by steamer or steamers to New York or Philadelphia or Boston or Baltimore at buyers option, port to be declared immediately.

Payment to be made by three days' sight draft on London. Buyers to open immediately confirmed irrevocable credit in favor of the seller for the full amount of the invoice with an approved London Bank and Bankers to confirm same to sellers in London immediately.

Discharge of 500 tons per weather working day. Demurrage of £450 per day, lay days counting 24 hours from arrival of steamers at or off port.

Delivery of the sugar to be made at a customary safe wharf as directed by the buyer.

Should any unforeseen circumstances such as accidents, [fol. 128] stress of wheater, etc., prevent the steamer or steamers hereafter declared against this contract from clearing within the time specified above, and the seller

or their Agents be unable to supply other tonnage of equal character and capacity, the buyer has the option of cancelling such portion of this contract as has not cleared within the time specified above, or taking the sugar for later shipment, without claiming damages and their decision is to be given immediately on advice from seller that delay has occurred.

Czarnikow-Rionda Co., Brokers. (Signed) E. H. Costello, Secretary & Treaurer."

The plaintiffs offered in evidence a copy of the purchase and sales contract betwen Lamborn & Company and T. S. Southgate & Co., dated April 23, 1920, marked Plaintiffs' Exhibit X. This paper was read by Mr. Van Doren, and the following is a copy thereof:

"PLAINTIFFS' EXHIBIT X

Plaintiffs' 39 for Ident.—5/8/22. H. C. T.

Contract

Lamborn & Company, 132 Front Street, New York

A B-522

April 23rd, 1920.

To Messrs. T. S. Southgate & Company, Norfolk, Va.:

Quantity

We have this day sold to you for account of ourselves 1,000 Bags (of about 224 lbs. each) Tons (of # # # # lbs. [fol. 129] each) Ten per cent more or less Java White Sugars.

Price

At Twenty-two Cents per pound Less 2%, duty paid. (f. o. b.) cars Philadelphia, Pa.) landed weights.

Shipment

Shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to

Philadelphia, Pa. Names of such steamer or seamers to be declared later. Should steamer or steamers declared against this contract fail to arrive at port of destination for any cause, sellers are relieved of responsibility under this contract. In case of damage to the sugars on steamer in transit to Philadelphia, Pa., preventing seller from making full delivery, sellers will deliver under this contract to each of the purchasers of the sugars aboard said steamer a proportionate part of the sound packages.

Payment

Payment to be made by net cash on presentation of Sight draft with invoice, and bill of lading attached in New York. Buyers to open within five (5) days confirmed irrevocable letter of credit in favor of Lamborn & Company, New York City, for the full invoice value of 1,100 bags with Bankers Trust Company, New York City and Bankers to confirm same to Lamborn & Company, New York City.

Should any unforeseen circumstances, such as embargoes, government supervision or interference, accidents, fires, strikes, car shortages, riots, stress of weather, etc., prevent shipment within the time specified above, the buyer has the option of cancelling such portion of this contract affected by such delay or taking the sugar so affected for later shipment, without claiming damages, and buyers decision is to be given immediately on advice from sellers that delay has occurred.

In the event of such cancellation by buyer, the sellers [fol. 130] shall be under no further obligation to the buyer under this contract.

Lamborn & Co. C. A. G."

Accepted. Entered. T. S. Southgate & Co. D. M. Thornton.

STATEMENT RE PLAINTIFFS' EXHIBITS 1 TO 7

The plaintiffs offered in evidence seven bills of lading covering approximately forty thousand bags in the aggre-

gate of Java white sugar on board the Japanese steamship "Chifuku Maru" at the port of Surabaya, Island of Java, bearing date September 15, September 28th and September 24th, marked Plaintiffs' Exhibits 1 to 7, inclusive.

Mr. Taylor: I object to such of these exhibits as are tendered as they show an alteration therein, erasing the word- "New York" and substituting the word "Philadelphia" which seems to be in a different handwriting and different ink.

The Court: I will allow them to come in with the understanding that you will not only show they are original bills from which the cargo was delivered and customs paid but you will account for the apparent change if there is one, in the bill.

These papers consisted of seven on board ocean bills of lading of the S. S. "Chifuku Maru," covering in the aggregate 40,259 bags of sugar, all dated Surabaya, Java, on the 15th, 24th, and 28th of September, 1920, respectively, and purporting to cover transportation from Cheribou to Philadelphia, and from Samarang to Philadelphia, respectively, consigned to order notify Lamborn & Company, all endorsed by the shipper in blank.

(NOTE.—Plaintiffs' Exhibits Nos. 1 to 7 are not printed in full, the parts omitted not being deemed material by the parties.)

[fol. 131] Plaintiffs offered in evidence the original bill of lading of the steamship "West Cheswald," marked Plaintiffs' Exhibit No. 8.

STATEMENT RE PLAINTIFFS' EXHIBIT 8

This was an on-board order ocean bill-of-lading dated Samarang, September 30th, 1920, covering 34,666 bags of sugar of a gross weight of 56,852.24 piculs, marked N. M. V. O. New York, made in Java. It read in part:

"Received on board S. S. West Cheswald, * * * to be transported via port or ports, within or without the ordinary course of the voyage, and in any order or rotation, as

hereinafter provided in Article 1 hereof, to the port of destination or discharge, or so near thereto as the vessel may safely get, always afloat at all stages of the tide, on payment of the freight and charges thereon, in United States currency, or New York exchange, unless otherwise specified herein, without any deduction, whatsoever. The name of the consignor or shipper, consignee and vessel, respectively, and the destination and particulars as to the merchandise, to be shipped hereunder, as given by the consignor or shipper, the port of destination, freight, primage and other charges, payable thereon, are stated on the reverse side of this bill-of-lading, and are a part of the contract of carriage."

"1. The carrier may for any reason, substitute any other vessel or vessels or any space therein for the one named herein, either before or after receipt or shipment of goods whether at port of shipment or at any other port or place, and/or may transport the whole, or any portion, of the goods by any other vessel or vessels, at the original port of shipment, or at any other port or place. The carrier shall have the further right to convey the goods in and by craft, lighters, carts or other conveyances to and from the vessel or vessels, at the risk of the goods. The vessel, with the goods on board, either before or after proceeding toward the port of discharge, may proceed by any route, and, at any stage of the voyage, may deviate from, or change the intended route, and may proceed to, or toward, call, enter or stay at, any port or place whatsoever, although in a contrary direction to, or outside of, or beyond, the usual route [fol. 132] to the said port of discharge, once or oftener, in any order or rotation, backwards or forwards, for any purpose whatsoever, that, in the opinion of the carrier, may seem advisable, desirable, or convenient, and may also adjust compasses, dock or dry-dock, go on ways, with or without cargo on board, before or after commencing the voyage, and may sail, and/or enter, any port or place with or without pilots, may tow and assist vessels in all situations, and the doing of anything, hereinabove mentioned, shall not be deemed a deviation, but shall be deemed included within the intended voyage, as fully as if specifically provided for herein, this liberty not to be considered

as restricted by any words of this bill-of-lading whether written, printed or stamped herein or hereon."

On the reverse side the bill-of-lading read in part:

"Steamship West Cheswald, port of discharge, New York, shipped by Ned. My. Voor Overzeehandel, consigned order, destination Port Said, option New York, party to be notified Messrs. Lamborn & Co., New York."

It was signed by the United States Shipping Board Emergency Fleet Corporation, Francis Peek & Co., Ltd., by du Cloux, and was endorsed by "Ned. My. Voor Overzee Handel" in blank.

So much of the further provisions of this bill-of-lading as are deemed material by the parties are as follows:

"Should the steamer be detained by authorities of any country and be required to discharge at or return to any port all or some of the goods, the master at his option is authorized either to so discharge such goods or—after reaching a subsequent port or the port of destination—to forward the goods to such ports as the said authorities may require, to store the goods there and/or deal with them in such manner as the said authorities may direct, at the risk and expense of the owners of the goods. The port where the goods are so discharged or to which they are so forwarded shall then be deemed to be the port of destination, the ship having a lien on such goods for the freight as per [fol. 133] B/L and for all expenses incurred, including the forwarding freight from the port of transshipment."

NOTE.—Plaintiffs' Exhibit 8 is not printed in full, the parts omitted not being deemed material by the parties.

The plaintiffs offered the deposition of GIICHI ISHIDO, taken in New York City on February 10th, 1922, which in narrative form is as follows:

I reside at 500 West 140th Street, New York City. I am over twenty-seven years of age and am a clerk in the employ of Suzuki & Company, 220 Broadway, New York City; they are importers and exporters and are the agents for the Japanese steamship line called the Teikoku Kisen

Kabushiki Kaisha. I have been with Suzuki & Company for about four years.

I know the gentleman called M. Kamimura; I knew him in 1920 in Java, where I was from August to November 11th, 1920. I met Mr. M. Kamimura at Surabaya. He was the manager of Suzuki & Company at Surabaya and in charge of sugar shipments for Suzuki & Company. I arrived at Surabaya on August 10th and stayed there until November 11th. During that period of three months I was continuously in Surabaya. I saw Mr. Kamimura frequently during that period, and came to know him quite well. I was a clerk in Suzuki & Company's office in Surabaya, handling sugar shipments, and Mr. Kamimura was my superior; I was working in Mr. Kamimura's office.

I know the signature of Mr. M. Kamimura quite well. The seven papers which are shown me I saw at Surabaya and know them very well. I have seen papers like them before; they are in the form used by Suzuki & Company as agents for the Teikoku Kisen Kabushiki Kaisha.

While I was a clerk in the office of Suzuki & Company at Surabaya, Java, between August 10th and November 11th, 1920, these seven papers shown me came into my hands and under my observation. I examined them before I delivered them.

I recall the steamship Chifuku Maru during my clerkship at Surabaya under Mr. Kamimura. I do not know [fol. 134] what line she belonged to but she was a steamer of which Suzuki & Company were the agents.

I recognize the signature of M. Kamimura on each of these seven papers shown me; they bear the genuine signature of Mr. M. Kamimura. (These papers marked Plaintiffs' Exhibits 1 to 7, inclusive, for identification.)

The substitution of the word "Philadelphia" for "New York" on exhibits numbers 3, 4 and 5 was made by myself in my own handwriting. The words "as arranged" in ink upon Plaintiffs' Exhibits 1, 3, 4 and 5 were upon those documents before they came to me. The words "as arranged" in typewriting upon Plaintiffs' Exhibits 2, 6 and 7 were on those papers before they came into my hands.

Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6 and 7 are genuine bills of lading issued by Suzuki & Company at Surabaya for the steamship Chifuku Maru.

These documents, Plaintiffs' Exhibits 1 to 7, inclusive, were delivered by Suzuki & Company on the dates they bear. The date on Plaintiffs' Exhibit 6 is very faint and difficult to read, but I have Suzuki & Company's office copy of the same paper which came from Surabaya to Suzuki & Company in New York. Refreshing my recollection from that paper, I state that the date of Plaintiffs' Exhibit 6 for identification is September 24, 1920.

The documents were dated the day the loading of the cargo was finished. I don't remember exactly when they were delivered but it was probably within ten days or two weeks.

The signature to the endorsement on Plaintiffs' Exhibits 1 to 7, inclusive, under the typewritten words "per pro Suzuki & Company" is that of M. Kamimura; they are his genuine signature.

The plaintiffs offered the deposition of JINOSUKE MINAMI, taken in New York City on February 10th, 1922, which in narrative form is as follows:

I live at 135 Kelvin Street, Forest Hills, Long Island. I am thirty-five years old and am New York representative for Suzuki & Company. I am manager of Suzuki & [fol. 135] Company's New York office. I am the head man in the New York office.

Suzuki & Company are agents for the Teikoku Kisen Kabushiki Kaisha.

Suzuki & Company is a partnership.

I know Mr. M. Kamimura personally. His first name is Masakichi. I have known him for four or five years. He is employed by Suzuki & Company but I don't know in what place. He was employed by Suzuki & Company in September, 1920, in Surabaya, I am informed.

I have heard of the steamship Chifuku Maru; Suzuki & Company were the agents for that ship; the Chifuku Maru was a ship of the line called Teikoku Kisen Kabushiki Kaisha.

I know the signature of Mr. M. Kamimura. I know his signature in the Japanese form but the signatures on the bills of lading Plaintiffs' Exhibits 1 to 7 are written in English script.

The plaintiffs offered the deposition of S. Alting Du Cloux, taken at Samarang, Java, on written interrogatories which was as follows:

"My name is G. Alting du Cloux. I am forty-two years of age and reside in Batavia, at Museumlaan 12. I am a partner of the firm of J. C. Van Rossen and Company, steamship agents in Batavia, Samarang and Surabaya.

Shortly prior to and subsequent to September 30th 1920, my place of residence was Batavia. I was employed by Francis Peek & Company, Limited, as manager of the shipping department. I remember that in September, 1920, the steamship "West Chestwald" was loaded by the Nederlandsch Maatschappy Voor Overzee Handel, who were the shippers of certain sugar. I do not know who the consignee of the sugar was. The signature on the photostatic copy of an ocean bill of lading of the steamship "West Cheswald," dated at Samarang, Java, September 30th, 1920, is my own. I signed that bill of lading on September 30th, 1920, at the instance of the shippers, on the authority that I had from Francis Peek & Company, Limited, to sign the bill of lading as manager of the shipping department. It was signed on behalf of Frances Peek & Company, Limited, and I signed it in the name of [fol. 136] Francis Peek and Company, Limited, as agents for the United States Shipping Board, Emergency Fleet Corporation, United American Lines, Incorporated, successors to Independent Steamship Corporation, Agent.

I handed the original bill of lading over to the shippers against payment of freights and against letter of guarantee of the shippers according to which they promised to deliver to the steamship agents the mate's receipts signed by the captain of the steamship "West Cheswald" as soon as those mate's receipts came to hand to them from Samarang. The captain signed the mate's receipts in Samarang as soon at the cargo was taken over. Those mate's receipts were handed to the shipper to send them to Batavia and deliver them to the steamship agents here in exchange for the bill of lading and the letter of guarantee.

The mate's receipts are receipts signed by the captain declaring having received on board the cargo mentioned therein.

During the time the "West Cheswald" was loading sugar in Java it happened that steamers arrived after the

date specified in the contract of purchase between the shippers and consignees, that is such steamers were to be loaded before a certain date. Bills of lading were given by the steamship agents, bearing a date of shipment falling within the shipping period stated in the contract of purchase. On account of a heavy fall in prices of sugar during the month of September, 1920, the purchasers endeavored wherever possible to cancel contracts and for that purpose investigated carefully the dates of departure of the steamers, but in the sase of the "West Cheswald" the loading actually began, I believe, on the 28th of September, 1920. It is so long ago that I cannot remember the date exactly but the fact is loading was begun in time so that by greatest effort and by loading at night, the loading of cargo in question was completed on September 30th, 1920."

STATEMENT RE PLAINTIFFS' EXHIBIT 235

The plaintiffs offered in evidence a paper marked Plaintiffs' Exhibit 235. This was an on-board ocean bill-of-lading of the S. S. Washington Maru dated September 28th, 1920, covering 10,043 bags of sugar and covering transportation from Surabaya to Philadelphia, the goods being consigned to order notify Lamborn & Company, New [fol. 137] York, and the bill-of-lading being endorsed by the shipper to the American Foreign Banking Corporation and by the American Foreign Banking Corporation to Lamborn & Company.

(NOTE.—This Exhibit 235 is not printed in full, the parts omitted not being deemed material by the parties.)

The plaintiffs offered in evidence a letter from Lamborn & Company to T. S. Southgate & Company dated August 30, 1920, marked Plaintiffs' Exhibit 49. This paper was read by Mr. Van Doren and following is a copy thereof:

"PLAINTIFFS' EXHIBIT 49

August 30, 1920.

T. S. Southgate & Co., Norfolk, Va.

GENTLEMEN: We hereby declare that the steamships "Chifuku Maru" and "Washington Maru" or substitutes will carry the 1,000 bags of Java Sugars purchased by you under contract dated April 23, 1920.

Very truly yours, Lamborn & Company.

CG:VR."

The plaintiffs offered in evidence letter from Lamborn & Company to T. S. Southgate & Company dated September 29th, 1920, marked Plaintiffs' Exhibit #50. This paper was read by Mr. Van Doren and following is a copy thereof:

"PLAINTIFFS' EXHIBIT #50

Refined Sugar Dept. CAG:IW

9/29/20.

T. S. Southgate & Co., Norfolk, Va.

[fol. 138] GENTLEMEN: We have received advices that the S/S 'Chifuku Maru' carrying your Javas purchased under contract dated April 23rd, 1920, sailed from Java on Aug. 22nd, and is due to arrive the latter part of Oct.

Very truly yours, Lamborn & Company."

The plaintiffs offered in evidence paper marked Plaintiffs' Exhibit 51, being a letter from Lamborn & Company to T. S. Southgate & Company, dated November 10, 1920. This paper was read by Mr. Van Doren, and the following is a copy thereof:

"Plaintiffs' Exhibit 51

Refined Sugar Dept. CAG:IW

Nov. 10th, 1920.

T. S. Southgate & Co., Norfolk, Va.

Gentlemen: On September 29th we notified you that the steamer 'Chifuku Maru' was due to arrive the latter part of October.

We are now in receipt of advices to the effect that this steamer is not expected to arrive before the last half of November.

Yours very truly, Lamborn & Company."

The plaintiffs offered in evidence a letter from Lamborn & Company to T. S. Southgate & Company, dated December 13, 1920, marked Plaintiffs' Exhibit No. 52. This paper was read by Mr. Van Doren, and the following is a copy thereof:

[fol. 139] "Plaintiffs' Exhibit 52

December 13, 1920.

Messrs. T. S. Southgate & Company, Norfolk, Virginia:

Dear Sirs:

Contract April 23, 1920, 1,000 Bags, 10% More or Less

On November 10, 1920, we advised you that the Steamer 'Chifuku Maru', previously declared to carry sugars against the above contract, which was expected to arrive in Philadelphia the last half of November, 1920, had been unavoidably delayed, owing to accident to her machinery, making it necessary to stop at Port Said, and at this writing we have received no definite information as to the sailing date from that port.

In consideration of the above mentioned circumstances, we hereby declare the steamer 'West Cheswald', carrying the same quality of sugar, and having made the same

shipment from Java, in fulfillment of your contract, which steamer is expected to arrive in Philadelphia this week.

Very truly yours, Lamborn & Company."

N. Nelson Keen, being first duly sworn, testified on behalf of the plaintiffs as follows:

Examined by Mr. Van Doren:

I reside at Upper Montclair, New Jersey. I was at the time of the occurrence of the circumstances and facts of the transactions upon which this litigation is based, a member of the firm of Lamborn & Company. I subsequently retired from that partnership, about April 1st, 1923, subsequent to the commencement of this action. While I was a member of the firm, I had to do with these shipments of Java white sugar. I was in charge of the financial de- [fol. 140] partment of our business and had supervision of the letters of credit and contracts came to my attention. The contracts as made both abroad and here, that is for the sugars in bulk and the cargoes and for their disposition or resale here came into my hands, and likewise the letters of credit or other terms of payment under those contracts were peculiarly within my province.

I know about the letter of credit which was posted by the defendant here. I am familiar with all of the circumstances and transactions in this matter. I was a witness on the former trial. The facts concerning the delay or accident of the "Chifuku Maru" came to my knowledge at or about the time thereof.

The plaintiffs offered in evidence a letter from Czarnikow-Rionda Company dated October 8, 1920, to Messrs. Lamborn & Company, marked Exhibit No. 201. This paper was read by Mr. Van Doren, and following is a copy thereof:

"Plaintiffs' Exhibit 201

Czarnikow-Rionda Company

New York, October 8, 1920.

Messrs. Lamborn & Company, New York.

Dear Sirs:

Contract AB-522—April 12th

Kindly note our London representatives cable us today that 40,259 bags against the above contract have been shipped per s/s 'Chifuku Maru'—which advice amends our letter to your of August 14th.

This information is passed on to you under usual reserve for telegraphic errors and subject to substitution.

Yours truly, Czarikow-Rionda Company. C. H. A. Mott, Vice-President."

[fol. 141] These papers marked Plaintiffs' Exhibits 48, 53, 54, 55, 202, 203, 204, 205 and 56, came to my knowledge and attention at or about the time that they bear date, in the usual course of my business, as I have described my business at that time.

The plaintiffs offered in evidence documents marked Plaintiffs' Exhibits 48, 53, 54, 55, 202, 203, 205, and 56. They were read by Mr. Van Doren. Plaintiffs' Exhibit No. 48 was a notice from the New York Maritime Register of the issue of November 17, 1920, as follows:

Plaintiff's Exhibit 48

"Chifuku Maru (Jap s s)—London, November 15.

A telegram from Port Said states that steamer Chifuku Maru, from Colombo, etc., for Philadelphia, has arrived there with high pressure cylinder and piston damaged; repairs will require about seven days."

PLAINTIFFS' EXHIBIT No. 53

"November 17th, 1920.

United American Lines, Inc., 39 Broadway, New York City.

Mr. Gilbride

GENTLEMEN: We have been requested by our clients, Messrs. Lamborn & Company, to determine the delay and sailing date of the S. S. 'Chifuku Maru,' bound from Colombo to Philadelphia, which is reported now in Port Said with machinery damaged. We will appreciate your sending the enclosed cable requesting this information for our account.

Kindly inform us of any expense in connection with sending same and we will forward remittance promptly.

Thanking you for this courtesy, we are,

Yours very truly, Comet Forwarding Corporation,
by —— —— President,"

PCC/MM.

[fol. 142] PLAINTIFFS' EXHIBIT No. 54

"#13 Chifuku Maru Colombo for Philadelphia Understand Port Said Machinery damaged determine delay and sailing date also if any damage cargo."

PLAINTIFFS' EXHIBIT No. 55

"United American Lines

New York, Nov. 24, 1920.

Comet Forwarding Co., 132 Front Street, New York City.

DEAR SIRS: We received the following cable from our agents, Messrs. Worms & Co., at Port Said,

Fifth Captain Chifukumaru thinks no damage to cargo expects sail about Fourth December Worms.

Cable it attached.

Bill for charges for both cables will be forwarded to you through our accounting department.

Very truly yours, United American Lines, J. J. Geuride, Ass't Freight Traffic Manager."

J. J. G./C.

PLAINTIFFS' EXHIBIT No. 202

[fol. 143] Nov. 23, 1920.

JK X217 Low Portsaid 16.
Unamline NY.

Fifth Captain Chifukumaru thinks no damage to cargo expects sail about fourth December.

Worms."

PLAINTIFFS' EXHIBIT No. 203

"December 6th 1920.

United American Lines, 39 Broadway, New York City.

Mr. Gilbride

GENTLEMEN: In accordance with telephone conversation, kindly cable your agents in Port Said as follows:

'Cable date Chifuku Maru sailed if still in port cable date clearance.'

Thanking you for this favor, we remain,

Yours very truly, Comet Forwarding Corporation, by —— ——, President."

PCC/MM.

PLAINTIFFS' EXHIBIT No. 204

"#1 cable date Chifuku Maru sailed stop if still in port cable date clearance."

[fol. 144] PLAINTIFFS' EXHIBIT No. 205

"United American Lines, New York

Dec. 11, 1920.

Comet Forwarding Co., 132 Front Street, New York City.

Attention of Mr. Cornelius

DEAR SIRS: Supplementing our letter of Dec. 7th, attaching copy of cable sent to Hull Blythe & Co. in your behalf inquiring of the Chifuku Maru, we are attaching copy of reply for your information.

Very truly years, United American Lines, Inc. J. J Guerdie, Ass't Freight Traffic Manager."

——G/C.

PLAINTIFFS' EXHIBIT No. 56

"Chifuku: Chifuku.
Efangutix: Delay owing to strike.
Padohrolcy: Repair shop.
Vyhyouhhym: We will telegraph immediately.
Pragdojtyp: Steamer sails probably—
Vynugvapor: Next week

Hull Blythe & Co."

The cargo of the "West Cheswald" under the bill of lading which has been offered in evidence, we received in good order and condition. The "Chifuku Maru" ultimately arrived February 4, 1921, at Philadelphia. Lamborn & Company received the cargo consigned to them under those [fol. 145] bills of lading, in good order and condition. The "Washington Maru" arrived on or about December 19, 1920, at Philadelphia. The "Chifuku Maru" arrived at Philadelphia; likewise the "West Cheswald." We received and obtained from the steamship "Washington Maru" the bags of Java white sugar covered by the bill of lading which has been offered in evidence of that ship, in good order and condition. The "West Cheswald" arrived on or about December 16, 1920, at Philadelphia;

the "Washington Maru" on or about December 19, 1920; and the Chifuku Maru" on February 4, 1921; so that the "West Cheswald" and the "Washington Maru" arrived within three days of each other. They both reported at the same time, and carried this same Java white sugar.

These documents shown me, which are marked 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216 and 217, came into my hands and to my knowledge and attention at or about the time that they bear date.

These documents were offered in evidence by the plaintiffs, and were read by Mr. Van Doren. The following are copies thereof:

"PLAINTIFFS' EXHIBIT #206

Tracy Steamship Company, New York, U. S. A.

Dec. 2nd, 1920.

Messrs. Lamborn & Company, 132 Front Street, New York, N. Y.

(Att'n Mr. Dyer)

GENTLEMEN:

S/S. West Cheswald

We beg to refer to telephonic conversation of yesterday with our Mr. Weston with reference to diversion of the above vessel to Philadelphia.

[fol. 146] In order that we may have your request in writing, will you kindly confirm by letter your desires in this respect also setting forth amount of cargo on board the West Cheswald for your account.

Yours very truly, Tracy Steamship Company, Inc. L. Morton Jensen. (Signed L. Morton Jensen), Marine Superintendent."

"PLAINTIFFS' EXHIBIT #207

December 3rd, 1920.

Tracy Steamship Company, 17 Battery Place, New York City.

GENTLEMEN:

Attention of Mr. L. M. Jensen

Replying to your favor of December 2nd, regarding the 'West Cheswald', we wish to inform you that we have about 3,572 tons of white Java sugars on this boat.

As one of the writers' assistants explained over the telephone, we may find it necessary to discharge the 'West Cheswald' at Philadephia, and we would very much appreciate it if you would take this matter up with the Shipping Board immediately and find out, if it does become necessary for us to do this, how the matter can be arranged.

We would very much appreciate it if you would expedite this matter.

Yours very truly, Lamborn & Company, by ——.''

BDD/RCS.

[fol. 147] "PLAINTIFFS' EXHIBIT #208

New York, N. Y., December 11, 1920.

Master Steamer West Cheswald:

(From Ponta Delgada Dec. 3rd for New York) Radio immediately amount general and sugar aboard how stowed and if sugar Lamborn can be discharged without moving other cargo.

Tracio.

12:30 p. m.
J/CW.
Charge M. H. Tracy & Co., Inc.
W. U. radio.''

"Plaintiffs' Exhibit #209

1920, Dec. 11, P. M. 5:35.

NS SV WX 2 57 Radio SS Westcheswald 3 am Dec. 9th via Bermuda and Barrington Passagens Dec 11.

Govt Cacio NYK.

Twenty seven hundred tons general cargo numbers one two four five hatches including eleven hundred tons sugar marked S Z K optional Delaware breakwater for which has no manifest bills lading neither for cargo loaded at Surabaya Lamborn sugar available without moving other cargo and must be discharged first ship due about Dec. 14th am. Master."

"Plaintiffs' Exhibit #210

Lamborn & Co., New York

December 13th, 1920.

[fol. 148] Tracy Steamship Company, 17 State Street, New York City.

Gentlemen: Confirming telephone conversation of this afternoon Mr. Gawel, in reference to our conversation with Mr. Sinclair of the Shipping Board, we herewith authorize you to divert the S/S 'West Cheswald' to Philadelphia, and advise you that on account of such diversion, we agree to pay One Dollar ($1.00) per ton, bill of lading weight, excess freight on the quantity of about thirty-five hundred and seventy-two tons (3572) of Java white sugars which are coming to us on this boat.

This letter is written in duplicate and your acceptance of the attached copy constitutes our agreement.

Thanking you for your cooperation in this matter, we beg to remain,

Yours very truly, Lamborn & Company. B. W. Dyer."

BWD/RCS.

"Plaintiffs' Exhibit #211

M. H. Tracy & Co., Inc.

Radio

Date: Dec. 13, 1920.

Master Steamer West Cheswald (from Ponta Delgada, Dec. 3rd, for New York):

Proceed Philadelphia reporting Megee acknowledge.

Tracio."

[fol. 149] "Plaintiffs' Exhibit #212

2PTBW 10GOVT RADIO.
SS Westcheswald Via Pt Newyork Dec. 14 20.
Govtsb Tracio, Newyork:
Westcheswald proceeding philadelphia as per instructions.

Master. 155A."

"Plaintiffs' Exhibit #213

Tracy Steamship Company, New York

December 14, 1920.

Messrs. Lamborn & Company, 132 Front Street, New York City.

Gentlemen:

SS. West Cheswald

Replying to your favor of 13th instant which is hereby acknowledged, concerning the diversion of the above steamer to Philadelphia for discharge of your sugar.

We have succeeded in reaching the vessel by radio and she is now proceeding on her way to Philadelphia.

Yours very truly, Tracy Steamship Company Inc.,
per (Signed) Francis C. Gawel.

FCG/WMK

[fol. 150] Certified true copy.
Tracy Steamship Company, Inc., per (Signed) Francis C. Gawel. Francis C. Gawel."

"PLAINTIFFS' EXHIBIT #214

H 39 P 9Govt Radio.
SS Westcheswald via U. S. Philadelphia, Penn., 15:
Govt. SB. Tracto, New York:
Westcheswald arrived Delaware Breakwater Midnight.
Master."

"PLAINTIFFS' EXHIBIT #215

Tracy Steamship Company, New York

December 16, 1920.

Messrs. Lamborn & Company, 132 Front Street, New York City.

GENTLEMEN:

Attention Mr. Dyer. S/S 'West Cheswald'

We enclose herewith our invoice covering extra freight due the above steamer on account of diversion from New York to Philadelphia.
[fol. 151] Will you kindly let us have your check to cover, and much oblige,
Yours very truly, Tracy Steamship Company, Inc., Per Francis C. Gawel. Francis C. Gawel."

FCG/MMK.

"PLAINTIFFS' EXHIBIT #216

Dec. 16, 1920.

Messrs. Lamborn & Co., 132 Front St., New York City.

To Tracy Steamship Company, Inc., Dr.

SS. West Cheswald No. 1

Extra freight due on account diverting above steamer from New York to Philadelphia as per your letter of agreement dated December 13th, 1920, 3,572 tons sugar (Java) at $1.00 per ton. $3,572.00

Adjustable on Bill of Lading weight."

"Voucher No. 21977. New York December 16th, '20. No. 3636.

Lamborn & Co.:

Pay to the order of Tracy Steamship Company $3,572.00, three thousand five hundred seventy-two and 00/100 dollars.

Irving Nation Bank.

1-67. New York. Duplicate.

Memorandum of settlement.

Please detach before presenting.

[fol. 152] Description: ——. Distribution: ——.

Invoice Dec. 16th for freight SS. West Cheswald 3572.00"

"PLAINTIFFS' EXHIBIT #217

United States Shipping Board Emergency Fleet Corporation

New York, December Fourteenth, 1920.

M. H. Tracy & Company, 17 State Street, New York City.

Att. Mr. Gawel, West Cheswald

GENTLEMEN: This will confirm authority given you by telephone last evening to divert the SS West Cheswald to Philadelphia, in order to discharge a consignment of sugar

for Lamborn & Company, which we understand amounts to approximately 3,572 tons. You will assess Lamborn & Company $1.00 per ton additional on this consignment to compensate as for the diversion of this vessel.

We confirm your advice to us that this arrangement is acceptable to Lamborn and Company.

Yours very truly, J. F. Andrews, Mgr. Traffic Department, by J. Sinclair. (Signed) J. Sinclair, Tr. Supervisor (Acting) Far East & African Trades."

JS/MS.

After the arrival at Philadelphia of the steamship "West Cheswald" shipping documents and drafts were prepared for delivery to the Bankers Trust Company under the letter of credit No. 105 of the defendant in this case. The documents shown me marked Plaintiffs' Exhibits 18, 19, 20-A, 21, and 16-A were prepared under my instructions with my knowledge and direction. The endorsement on the [fol.153] back of the railroad bill of lading, Exhibit 16-A, is that of Leonard Elsmith, my assistant, and was done under my authority and direction.

The plaintiffs offered these documents in evidence.

The following are copies of Exhibits 18, 19, 20, 20-A and 21 which were read by Mr. Van Doren:

"Plaintiffs' Exhibit #18

Lamborn & Company

DS 2855

$48,009.81. New York, December 20, 1920.

At sight Pay to the order of ourselves Forty Eight Thousand and Nine Dollars—81/100 Dollars with exchange, Value received, and charge the same to account of T. S. Southgate & Co., Norfolk, Va.

6/11/20. Natl. Bank of Commerce, Norfolk, Va.

To Bankers Trust Co., New York City.

L/C-105 5/11/20.

Lamborn & Co."

"Plaintiffs' Exhibit #19

New York, December 17th, 1920.

Return of 1,000 bags sugar weighed for Mess. T. S. Southgate Co., Norfolk, Va., by order of Mess. Lamborn & Co., Ex S. S. "West Cheswald."

Car CRI&P	40979	335	Bags wg.	75420	lbs. gross
MSPSM	36470	335	" "	75620	" "
TNO	31041	330	" "	74240	" "
		1,000	Bags wg.	225280	lbs. gross
				2600	lbs. tare
				222680	lbs. net

Geo. J. Hoffman & Co."

[fol. 154] "Plaintiffs' Exhibit #20

Lamborn & Company, New York

Lot No. P. C. 22.
SS West Cheswald.
Invoice #DS-8622. December 20, 1920.
Sold to T. S. Southgate & Co., Norfolk, Va.
Bankers Trust Co., 6/11/20.
MK. Terms Natl. Bank of Commerce, Norfolk, Va.

L/C-105-5/11/20

1,000 Bags of Java White Sugar

1,000 Bags of Java white sugar, net weight 222,680 lbs. at 22c per lb. duty paid F. O. B. cars Philadelphia, Pa., landed weights....	$48,989.60	
Less 2%	979.79	
		$48,009.81

C R I & P—40979 335 bags.
Soo Line 36470 335 "
T & N O 31041 330 "

E. & O. E.

SD-2855

(Certified weight sheet attached.)"

PLAINTIFFS' EXHIBIT #20-A

Lamborn & Company, New York

Lot No. P. C. 22.
[fol. 155] Order No. SS. West Cheswald.
Invoice No. DS-8622. December 20, 1920.
Sold to T. S. Southgate & Co., Norfolk, Va.

Bankers Trust Co. 6/11/20

MK. Terms Natl. Bank of Commerce, Norfolk, Va.

L/C-105-5/11/20

1,000 Bags of Java White Sugar

1,000 Bags of Java White Sugar, Net Weight 222,680 lbs. at 22c per lb. Duty Paid F. O. B. Cars Philadelphia, Pa., Landed Weights	$48,989.60	
Less 2%	979.79	
		$48,009.81

C R I & P—40970 335 Bags.
Soo Line 36470 335 "
T & N O 31041 330 " E. & O. E.

SD-2855.
(Certified weight sheet attached.)"

"PLAINTIFFS' EXHIBIT #21

December 23rd, 1920.

To whom it may concern:

This is to certify that the 1,000 bags of Java White Sugar invoiced by us on our DS#-8622 to T. S. Southgate & Co., Norfolk, Va., were unloaded from the S/S 'West Cheswald,' and ocean bills of lading are on file

[fol. 156] in our office dated Samarang, Java, Sept. 30, 1920.
Yours very truly, Lamborn & Company, (Signed)
N. Nelson Keen, Member of Firm.

PJB/FB.

Sworn to before me this 23rd day of Dec. 1920.
Joseph N. Lo Medico."

That is my signature on Plaintiffs' Exhibit No. 21.

Plaintiffs' Exhibits 16 and 16-A were respectively a photographic copy and the original of an order railroad bill of lading of the Pennsylvania Railroad Company dated Philadelphia, Pa., December 17, 1920, covering 1,000 bags of Java Sugar loaded 335 bags on car No. CRI & P 40979, 335 bags on car No. SOO L 36470 and 330 bags on car No. T. & N. O. 31041, consigned to the order of Lamborn & Company, destination Norfolk, Virginia, notify T. S. Southgate & Company, Norfolk, Virginia. They bore on their face the following notations:

"Shippers No. West Cheswald"

"Lamborn & Company shippers Per W. H. L."

"Received at Wash. Ave. Wharf, Philadelphia, Pa. Dec. 17, 1920, Penna. R. R., M. J. Considine, Agent, per Hayes."

On the reverse they bore the endorsement:

"Lamborn & Co. by Leonard Elsmith."

(No other portion of these exhibits is printed as the parts omitted are not deemed material by the parties.)

It was stipulated that the photographic copy marked Plaintiffs' Exhibit No. 16 might be used in place of the [fol. 157] original Plaintiffs' Exhibit 16-A, and that the original might be handed back to the railroad company by whom it was produced upon the trial.

The plaintiffs offered in evidence a letter, dated December 23, 1920, from Lamborn & Company to Bankers Trust Company, marked Plaintiffs' Exhibit 17-A. This exhibit

was read by Mr. Van Doren, and the following is a copy thereof:

"PLAINTIFFS' EXHIBIT #17-A

Lamborn & Co., New York

December 23rd, 1920.

Bankers Trust Company, 16 Wall Street, New York City.

GENTLEMEN: We herewith beg to hand you shipping documents covering 1,000 bags of Java white sugar, amounting to $48,909.81, to apply against your Letter of Credit dated 6/12/20, opened in our favor for account of T. S. Southgate & Company, Norfolk, Va.

The injunction granted, copy of which was served upon you, authorizes us to deliver documents to your good selves, and you to retain same subject to further order of the court upon this injunction, which at present only prevents Lamborn & Company from accepting payment for the above shipment.

Yours very truly, Lamborn & Company. (Signed) N. Nelson Keen, Member of Firm.

JB:FB."

Subsequent to the date of that letter, I went to the Bankers Trust Company to see Mr. Kent, who was Vice-President of the Bankers Trust Company, concerning the refusal to pay on the part of the National Bank of Com-[fol. 158] merce. It was after the injunction had been vacated. He communicated with the National Bank of Commerce; some of the communications which were sent were shown to me.

Mr. Van Doren: I will hand you the communications and you can pick out those that were shown to you. Please pick out of those documents the documents which were shown to you by the Bankers Trust Company officials in the course of your communications and conversations with them. Lay them to one side or gather them in a separate package.

A. These three, to the best of my recollection, were shown to me; this one dated December 27, 1920, from the National Bank of Commerce to the Bankers Trust Company—I saw that in the hands of one of the men connected with the Bankers Trust Company and was not allowed to read the telegram.

Q. You did not read that?

A. No, I saw that.

Q. Keep the three that you did see and please continue with the statement or recital of your communications with the Bankers Trust Company, so far as you had any and all communications with them in regard to the payment or non-payment of this draft.

A. On or about December 27, 1920, the Bankers Trust Company sent the telegram which I hold here to the National Bank of Commerce at Norfolk.

(Witness read plaintiffs' Exhibit #35 as follows:)

PLAINTIFFS' EXHIBIT 35

December 27, 1920.

National Bank of Commerce, Norfolk, Va.:

Lamborn has presented draft and documents covering one thousand bags sugar under your credit one hundred five account Southgate documents apparently in order have you arranged examine documents please wire.

Bankers Trust Company."

[fol. 159] Mr. Van Doren: We offer that document in evidence marked Plaintiffs' Exhibit No. 35.

On December 29th, 1920, the Bankers Trust sent the following night letter to the National Bank of Commerce at Norfolk:

PLAINTIFFS' EXHIBIT 221

"Replying your telegram Southgate credit documents tendered by Lamborn in our opinion comply with terms

of credit Lamborn have exhibited blading dated Samarang September thirtieth covering sugars per steamer West Cheswald out of which delivery to cars at Philadelphia was made which complies with August/September shipment clause your credit do not know if sailing dates mentioned your wire refer this steamer. However this is question of steamer clearance which point is not covered in your credit and must not be confused with date of shipment as indicated by date of blading. If steamer Chifuku Maru originally declared by Lamborn no doubt contract with Southgate gives them the right substitute other steamer. All points mentioned your telegram are matter of contract between Lamborn and Southgate and do not concern terms your credit which have been complied with Injunction at present prevents Lamborn accepting payment but similar injunctions easily vacated. Unless you wire us to contrary will return documents to Lamborn notifying them you have instructed us as your agents under credit refuse payment. We and our counsel are of opinion Lamborn have strong case against you if payment refused. This wire sent for your information and guidance. Bankers Trust Company."

The conversation I had at that time was with both Mr. Kent and the attorney for the Bankers Trust Company who was present at that interview. There was an injunction pending. The substance of that conversation was that we were anxious to find out whether the Bankers Trust recognized the fact that the documents were in order according to the terms of the credit. We realized and they did too that the amount could not be paid until after the injunction had been vacated or dismissed. In fact, I said so myself.

T. S. Southgate & Company obtained an injunction in New York to restrain the bank from paying the letter of credit when documents were presented. By the bank I [fol. 160] mean the Bankers Trust Company, who were the paying agents for the National Bank of Commerce. The conversations I have given were during the pendency of that injunction.

After the injunction had been vacated I had another talk with Mr. Kent, Vice President of the Bankers Trust Company in New York on or about January 6, 1921, and the

following telegram was sent to the National Bank of Commerce at Norfolk, Virginia. Plaintiffs' Exhibit No. 227:

"Judge Burrough has vacated the order enjoining payment against presentation of documents under your credit one hundred five. Order will be entered today to that effect. Please remit funds to cover at once as the documents are in order and any delay in not meeting payment will be most embarrassing to yourselves and ourselves, Bankers Trust Company."

A copy of the certified order vacating the injunction was presented to the Bankers Trust Company about this time and payment was refused and the draft was protested. The ocean bill of lading of the steamship "West Cheswald" one of the documents which was left in the hands of the Bankers Trust Company for examination. They had it part of one day, I should say several hours.

The plaintiffs offered in evidence a file containing the entire correspondence between the defendant bank and the Bankers Trust Company, its agent in New York, in respect to the letter of credit and its non-payment, arranged in chronological order, the letters being marked Plaintiff's Exhibits Nos. 33, 34, 234, 36, 222, 223, 224, 225, 226, 227, 228, 31, 30, 229, and 230. They were read by Mr. Van Doren and the following are copies thereof:

"PLAINTIFFS' EXHIBIT #33

The National Bank of Commerce, Norfolk, Virginia

Dec. 11, 1920.

The Bankers Trust Co., New York City.

[fol. 161] GENTLEMEN: Referring to our letter of credit No. 105, dated May 11, 1920, established in favor of Lamborn & Co., 132 Front St. New York City in the sum of $53,123.84 for account of T. S. Southgate & Co., Norfolk, Va., covering purchase of 1,000 bags Java White Sugar, shipment August-September from Java by steamer to Philadelphia, which letter of credit was passed along to

Lamborn & Co. by you at our request and we presume is now held by them.

We are writing this letter to say that before payment of the funds is made to Lamborn & Co. against this credit, we desire to have an opportunity to personally examine the documents which are to be attached to their draft. We beg to ask, therefore, that you kindly notify us by wire when the documents are presented so that we can arrange to examine and approve them.

Your acknowledgment of and compliance with this request will be appreciated.

Yours very truly, A. E. Wharton, Ass't Cashier.

W/M."

"PLAINTIFFS' EXHIBIT #34

December 13, 1920.

The National Bank of Commerce, Norfolk, Virginia.

GENTLEMEN: Your favor of the 11th instant received and have taken note that we are to make no payments under the credit which you issued unless you have had an opportunity to examine the documents attached to the draft. Upon presentation of the documents we shall wire you immediately and trust that you can arrange to have the documents examined and approved in New York promptly.

We would suggest that you forward a copy of your letter to us to the beneficiary, as this is your letter of [fol. 162] Credit and the Bankers Trust Company acts simply as a paying agent.

Very truly yours, —— ——, Vice President.

JFS/RDW."

"Plaintieffs' Exhibit 234

Bankers Trust Company

FX Dept.

Cable Department

Date: Dec. 26/20.

Please send the following message;

To Natl. Bank of Commerce, City Norfolk, Va.:

Made up by A J K O K Charge to Collect.

Lamborn has presented draft and documents covering 1,000 bags sugar under your credit 105 account Southgate. Documents apparently in order. Have you arranged examine documents. Please wire."

"Plaintiffs' Exhibit 36

145N AJE 105.

MS Norfolk Va. 427 P Dec. 27, 1920.

Bankers Trust Co., New York:

Answering telegram we have convincing evidence that sugars tendered by Lamborn were not shipped from Java until October seventeenth maritime records show that ship on which loaded sailed from Samarang October eight, calling at Mascassar then Borneo and finally back to Samarang from whence sailed for New York October [fol. 163] seventeenth further that this ship was diverted to Philadelphia though originally intended for New York our credit specifically calls for shipment from Java August of September and Lamborn's failure to comply with this important requirement compels us refuse payment moreover our client has shown us letters indicating their sugars loaded on steamer Chifuke Maru which has never arrived.

National Bank of Commerce. 5:20 P. M."

"PLAINTIFFS' EXHIBIT #222

December 30, 1920.

National Bank of Commerce, Norfolk, Va.

GENTLEMEN: Re: Your credit No. 105 issued for account of Messrs. T. S. Southgate & Company in favor of Lamborn & Co., New York.

We enclose herewith a confirmation of our wire of yesterday's date regarding documents presented to us under the above credit.

We await your reply to our wire and remain,

Very truly yours, —— ——, Asst. Manager.

WJK/EH.

Enc."

"PLAINTIFFS' EXHIBIT #223

Bankers Trust Company

Cable Department

Date: Jan. 4, 1921.

Please send the following message:

[fol. 164] To Natl. Bank of Commerce, City Norfolk, Va.:

Made up by W J O K Charge to Collect.

Refer our telegram December 29 your credit favor Lamborn are informed injunction obtained by Southgate vacated. Please wire do you still desire we refuse payment as mentioned your wire December 27th."

"PLAINTIFFS' EXHIBIT #224

January 4, 1921.

National Bank of Commerce, Norfolk, Va.

GENTLEMEN: We enclose herewith confirmation of our wire of today, which is self-explanatory, and to which we await your reply.

Very truly yours, —— ——, Asst. Manager.

WJK/EH.

Enc."

"PLAINTIFFS' EXHIBIT #225

183NBZ 557P 20.
Norfolk, Va. Jan. 4.

Bankers Trust Co., N. Y.:

Replying to telegram are advised that terms of credit in favor Lamborn and Company not complied with we decline payment.

Natl. Bank Commerce."

[fol. 165] "PLAINTIFFS' EXHIBIT #226

Bankers Trust Company, New York

January 5, 1921.

Messrs. Lamborn & Company, 132 Front Street, New York, N. Y.

GENTLEMEN: Re: Credit #105 issued in your favor by the National Bank of Commerce, Norfolk, Va., for account of T. S. Southgate & Company.

Please be advised that we have received a wire from the National Bank of Commerce, Norfolk, Va., advising us that they decline to make payment under the above credit. As under this credit we are only the paying agents of the National Bank of Commerce in Norfolk, we are obliged to follow their instructions and are returning to you documents covering a shipment under this credit tendered to us in your letter of December 23, 1920.

We suggest that you take the matter up directly with the National Bank of Commerce, Norfolk.

Please acknowledge receipt of the enclosed documents, and oblige,

Yours very truly, W. J. K., Asst. Manager.

WJK/CA.
8 enclosures."

"Plaintiffs' Exhibit #227

January 6, 1921.

National Bank of Commerce, Norfolk, Virginia:

Judge Burrough has vacated the order enjoining pay-
[fol. 166] ment against presentation of documents under your credit number one hundred five order will be entered today to that effect please remit funds to cover at once as the documents are in order and any delay in not meeting payment will be most embarrassing to yourselves and ourselves.

Bankers Trust Company."

"Plaintiffs' Exhibit #228

1921, Jan. 7, P. M. 12:12.

A1 86 N 57.
MS Norfolk Va 11 48 A 7.

Bankers Trust Co., New York, N. Y.:

Southgate advises that expressed conditions of our credit number one hundred five have been grossly violated by sellers and declines to recognize payment of same in light of your repeated statements that you only acting as paying agent we cannot understand why you should feel embarrassed we reaffirm position outlined in our telegram January fourth to you.

National Bank of Commerce."

"Plaintiffs' Exhibit #31

January 8, 1921.

National Bank of Commerce, Norfolk, Va.

Gentlemen: Re: Your credit No. 105 issued in favor of
[fol. 167] Lamborn & Co. for account of T. S. Southgate & Company, your city.

In accordance with our exchange of telegrams of January 6th and 7th, we have advised Lamborn & Company of your

refusal to permit payment of their draft on us under the above credit for $48,009.81 covering shipment of sugar to T. S. Southgate & Company.

We have returned the documents to Lamborn & Company and have today been served with a notice of protest of the draft by Lamborn & Company for non-payment,

Very truly yours, W. J. K., Asst. Manager.

WJK/EH."

"Plaintiffs' Exhibit #30

United States of America,
State of New York, ss:

On the seventh day of January in the year of our Lord one thousand nine hundred and twenty one at the request of the holder thereof, I, Joseph N. Lo Medico, a Notary Public duly commissioned and sworn, dwelling in Kings County, did present the original instruments hereunto annexed, to a person in charge of the office of Bankers Trust Company, 16 Wall St., in the City of New York (being the place where the said instrument is payable), and demand payment thereof, which was refused:

And answer 'Will not pay':

Whereupon, I, the said Notary, at the request aforesaid, did Protest, and by these presents, do publicly and solemnly Protest as well against the Drawer and Endorsers of said instrument, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages and interest already incurred, and to be hereafter incurred, for want of payment of said instrument.

[fol. 168] In testimony whereof, I have hereunto set my hand and affixed my Seal at the above date as aforesaid.

Joseph H. Lo Medico, Notary Public. (Seal.)

Lamborn & Co. New York.
Natl. Bank of Commerce, Norfolk, Va.
Bankers Trust Co. New York.
T. S. Southgate & Co., Norfolk, Va."

"PLAINTIFFS' EXHIBIT #229

January 14, 1921.

National Bank of Commerce, Norfolk, Virginia.

GENTLEMEN: In your letter of April 27, 1920, you established a credit in favor of Messrs. Lamborn & Company through the Bankers Trust Company. Later an injunction was issued prohibiting payment. This injunction was vacated by Judge Greenbaum and we then wired you for instructions on January 6th. In reply, you telegraphed us that your client advised you that conditions of your credit have been grossly violated. The documents were later presented again to us and protested as advised you in our letter of January 8th.

As the matter stands now, Messrs. Lamborn & Company will be obliged to sue you and as far as we can see, they are certain to win such suit exactly as they have others under similar circumstances. This being true, it seemed to us that as you had requested us to act for you and as it is our custom to endeavor to protect our friends and clients in every legitimate way, that it is our duty to advise you of some developments in connection with bankers acceptances that have taken place recently.

In the first place, due to the great drop in the price of sugar and some other commodities, many importers in the United States, as well as in other countries have endeavored to avoid their obligations. In the United States this has [fol. 169] been attempted, first through obtaining injunctions prohibiting American banks which had issued Letters of Credit from acting under them. Such injunctions are being vacated as rapidly as they come to trial and their issuance has reflected seriously upon the credit of American institutions. In other cases importers have endeavored to get their bankers to refuse to acknowledge obligations undertaken in Letters of Credit by claiming that the shipments were not made in accordance with their contract with the exporter.

The courts have held (decision of Judge Greenbaum, in the Appellate Division in New York) 'that an irrevocable letter of credit was a complete and independent contract, and that holders in good faith of drafts drawn under the

letters of credit were entitled to the absolute benefit of its terms; that the bank issuing the credit was in no wise concerned with any contract existing between the buyer and the seller, and that a breach by the seller of that contract had no bearing upon the bank's liability under the letter of credit. The effect of this decision is to relegate the buyer to an action at law against the seller for any damage that might have been occasioned under the contract.

There is no question about the correctness of this decision, nor of its value to American banking and business interests, for otherwise no foreign banker would dare negotiate drafts against letters of credit issued by American banks. If absolute fraud in the shipment exists on the part of the exporter, it does not change the situation in the slightest particular provided the terms of a letter of credit have been carried out and drafts must be accepted by the issuers of the credit. If this were not true, it would not be safe for banks to issue letters of credit; neither would it be safe for other banks to negotiate drafts under them. As a matter of fact, this position has not only been upheld in British courts, but in American courts as well under the decisions of Judges Greenbaum and Cohalan.

In your telgram of January 7th, you state 'Southgate advises that expressed conditions of our credit—have been grossly violated.' As a matter of fact, the importer, after he has delivered the letter to the exporter or beneficiary under the credit, has no voice in the situation whatsoever and it then becomes the duty of the bank to live up to its agreement. Such a large number of cases of this kind have occurred that foreign and domestic bankers, foreign [fol. 170] and domestic courts, firms and corporations and the Federal Reserve Board and the Federal Reserve Banks in the United States have become much exercised over the situation. It is our understanding that the question is being considered by the Federal Reserve Banks as to whether they shall not absolutely refuse, in the future, to buy acceptances of banks which have repudiated their credits and the concensus of opinion among bankers and others with whom I have talked is that the Federal Reserve Banks would be thoroughly warranted in doing so as such repudiation shows lack of good faith, as well as willingness to jeopardize the credit of American banks throughout the world.

In your telegram of January 7th you also state that you cannot understand why we should be embarrassed in case of your refusal to authorize the credit to be paid.

Embarrassment to us would arise in case suit was brought against us as we would not, under any circumstances, wish to have our name appear in the courts in connection with a refusal to accept under a letter of credit. While in this particular case your institution would, of course, bear the real burden of such discredit as might arise, yet it might not be clear to a careless reader of any decision that was rendered that we were not involved.

If we should open a letter of credit for a customer of ours and all the terms of the letter as issued by us had been lived up to, we would honor it regardless of whether our client was in existence as a going concern at the time of presentation, or not.

I make this statement merely to show you now strongly we feel about matters of this kind and how clearly we believe that such obligations as we assume under a letter of credit are ours, and not subject to change by the importer because of his desire, or any contracts he may have in force that are not contained in the letter of credit or whether he is solvent or otherwise.

We have gone into this matter confidentially with you in considerable detail because we felt that you would like to know exactly the situation and see what you might be subjecting yourself to in case you refuse an obligation without just cause, which frankly we canont find in this particular case. In spite of what we said about our own con- [fol. 171] nection in the matter, it is really your interests which are paramount and it hardly seemed to us right that you should subject yourself to the discredit that is almost certain to ocur in case this matter goes to court without letting you see the situation as it has come to us.

This letter is not written with any desire to argue you into taking any position that you do not believe advisable, but merely to give you such facts as we feel you should have in order to help you in determining what position you wish to assume.

Yours very truly, F. I. Kent, Vice-President.

FIK/RG."

"Plaintiffs' Exhibit #230

The National Bank of Commerce, Norfolk, Virginia

Jan. 22, 1921.

Mr. F. I. Kent, Vice-President Bankers Trust Co., New York City.

Dear Sir: I have received, read and carefully considered your letter of January 14th, having reference to the Southgate credit.

In the outset permit me to assure you that this bank has a conservative as well as a comprehensive appreciation of the need for exercising care in the handling of credit letters and fully shares with you the solicitude expressed as to any general tendency to seek to render them less dependable or inviolate.

It seems to me, however, in your letter you have in mind a general principle and argue the matter from that standpoint, rather than that of the individual case under discussion.

[fol. 172] In order that you may clearly understand our position in regard to this particular credit, permit me to say:

(1) This credit letter was made irrevocable only upon full compliance with the conditions of same.

(2) Because there were conditions to be complied with, the instrument was non-negotiable. We were, therefore, advised by you that your interest in same was nominal or that of agent only.

(3) In support of the client's contention that conditions of credit had not been complied with, there was submitted to officers and counsel of this bank five different shifting sets of declarations of shipment of this product, copies of which are herewith enclosed to you.

(4) In connection with these papers unmistakable government evidence was also exhibited that shipment was not effected until eighteen days after date stipulated in fourth condition of credit letter.

We submit, therefore, gentlemen, that there was justifiable evidence before us to warrant the action taken.

As before stated, we readily appreciate the need for the utmost care in preserving credits of this nature, but in all conscience it is but fair to consider also the rights of others at the same time. It is one thing to stand for the technical observance of a principle, but quite another in doing so to subject a respected client to so manifest injustice as was apparent in this case and thus shift the burden of suit upon him.

So far as the courts are concerned, we have no fear of the result whatever from this standpoint, but naturally regret very greatly that any conditions should arise to occasion any strain upon our heretofore pleasant and friendly relations.

Yours very truly, (Signed) Nathaniel Beaman, President."

[fol. 173] "New York, Aug. 30/20.

T. S. Southgate & Co., Norfolk, Va.

GENTLEMEN: We hereby declare that the steamships 'Chifuku Maru' and 'Washington Maru' or substitute will carry the 1,000 bags of Java Sugars purchased by you under contract dated April 23, 1920.

Very truly yours, (Sig'd) Lamborn & Co."

"New York, Sept. 29/20.

T. S. Southgate & Co., Norfolk, Va.

GENTLEMEN: We have received advices that the S./S. 'Chifuku Maru' carrying your Javas purchased under contract dated April 23, 1920, sailed from Java Aug. 22d, and is due to arrive the latter part of October.

Yours truly, (Sig'd) Lamborn & Co."

"New York, Nov. 10/20.

T. S. Southgate & Co., Norfolk, Va.

GENTLEMEN: On Sept. 29th we notified you that the steamer 'Chifuku Maru' was due to arrive the latter part of October.

We are now in receipt of advices to the effect that this [fol. 174] steamer is not expected to arrive before the last half of November.

Yours truly, (Sgd.) Lamborn & Co."

"New York, Dec 13/20.

T. S. Southgate & Co., Norfolk, Va.

Contract April 23, 1920, 1,000 bags, 10% more or less

DEAR SIRS: On November 10, 1920, we advised you that the steamer 'Chifuku Maru,' previously declared to carry sugars against the above contract, which was expected to arrive in Philadelphia the last half of Nov. 1920, had been unavoidably delayed owing to accident to her machinery, making it necessary to stop at Port Said, and at this writing we have received no definite information as to the sailing date from that port.

In consideration of the above mentioned circumstances, we hereby declare the steamer 'West Cheswald,' carrying the same quality of sugar, and having made the same shipment from Java, in fulfillment of your contract, which steamer is expected to arrive in Philadelphia this week.

Yours truly, (Sgd.) Lamborn & Company."

"New York, Dec. 16/20.

T. S. Southgate & Co., Norfolk, Va.

GENTLEMEN: Please be advised that the S./S. 'West Cheswald' is now in the Port of Philadelphia, with sugars [fol. 175] to apply against your contract AB-522, dated April 23, 1920.

This is for your information.

Yours truly, Lamborn & Company."

Afternoon Session

N. NELSON KEEN resumed the stand for further direct examination:

By Mr. Van Doren:

I testified this morning that I saw this telegram, Plaintiffs' Exhibit No. 36, but I wasn't allowed to read the entire telegram. I saw it in the hands of the officer of the bank but I wasn't allowed to see its contents. I saw in its entirety Plaintiffs' Exhibit 227. That is the one I saw in the hands of one of the men in the bank (indicating Exhibit

36). At the time I was talking with the Bankers Trust Company I was not told of the contents of Plaintiffs' Exhibit 36, in its entirety. I recall from reading the telegram that the question of clearance was brought up and I explained to the gentleman who had the wire that our contract called for shipment and we weren't interested in clearance from Java. That is as far as I can remember of the contents of it. He said I had not shipped as the telegram said she had cleared on a certain date.

By the Court:

Q. And you say the loading on board was all that your contract required and it didn't make any difference when she sailed?

A. Yes, sir.

By Mr. Van Doren:

Q. Did the Bankers Trust Company ever say to you that non-payment of this draft was because of the nature of the bill of lading of the cargo of the "West Cheswald"?

A. No, sir, they did not.

Q. Did you rely on the stated ground of non-clearance or non-shipment in time, August and/or September, from Java in your subsequent conduct of this matter?

A. We did.

Q. Could you have given sugar to the amount of a thou-
[fol. 176] sand bags to T. S. Southgate & Company? Could you have shipped F. O. B. cars a thousand bags of this sugar to T. S. Southgate & Company from the cargo of the "Washington Maru"?

A. We could.

Cross-examination.

By Mr. Taylor:

I know what disposition was made of the entire cargo out of the "Washington Maru." The American Stores, Philadelphia, had 7,250 bags of the cargo of the "Washington Maru," the McMahon & Leib Company of Anderson, Indiana, had 400 bags. The Gammeter Commercial Company, 1,000 bags. A Blanton Grocery Company, 1,100 bags;

Jesse C. Stewart 281 bags, making a total of 9,931 bags. My recollection is that the balance of the number of bags were used for filling, sweepings, etc.

It is a fact that disposition was made at Philadelphia of the entire sugar cargo of the "Washington Maru," that disposition was made pursuant to previous declarations of that sugar in the "Washington Maru," substitutions finally from the "Chifuku Maru" from the "Washington Maru."

Q. So when the "Washington Maru" landed on December 19th all of that sugar by reason of substitutions and designations had been allocated to the parties whose names you have read?

A. I don't say that it had because a great number of these people had objected to the substitution of the "Washington Maru" for the "Chifuku Maru" and wanted us to leave the sugar on the "Chifuku Maru."

Q. But it was finally taken by them, was it not?

A. Yes.

Q. Pursuant to these substitutions and designations?

A. Yes, sir.

Q. And that disposed of your entire cargo out of the "Washington Maru"?

A. Yes, sir.

Q. Why did you divert the "West Cheswald"?

A. Two reasons, maybe three. The first reason was that we did not think that the "Chifuku Maru" would reach Philadelphia in order to deliver sugars in time to negotiate the credits which were up on the various contracts. The second reason was we had a right to do it. The third reason was it suited our purpose best to do it.

[fol. 177] Q. It is a fact that from September, 1920, until December 13, 1920, when this diversion was made by radio, the steamship "West Cheswald" was at no time destined to Philadelphia, Pennsylvania, was she?

A. After she had passed Port Said, she was coming on a natural course to New York.

Q. And she would have, in all human probability, arrived at New York had she not been diverted by radio?

A. That is correct.

Q. What was necessary for your firm in order to so divert the "West Cheswald" from her destination in New York to Philadelphia?

A. We had to, of course, communicate with the Shipping Board, who, in turn, communicated with the master of the ship to see how the cargo was stored and, of course, agreeing to pay the consideration of such diversion.

Q. You had no right to divert except with the consent of the owner of the ship?

A. Not after she passed Port Said.

Q. And, of course, she was in the Atlantic off the east coast of the United States at the time of diversion, was she not?

A. Yes, sir.

Q. And I believe it has been either stated or testified here that it cost your firm $1.00 per ton for some thirty-seven hundred tons of sugar for exercising that diversion?

A. That is correct.

Q. And if you had not made these arrangements the ship, as I say, would have perhaps reached New York in due course?

A. In the natural course, yes, sir.

Q. The "Washington Maru" landed on December 19th. It didn't take her very long to discharge her cargo because she only had a little over ten thousand bags on board. She was in port the same time that the "West Cheswald" was discharging but the exact date when she completed, I couldn't tell without our records. I would say it took four or five days. The sugar went off to our various customers as promptly as it was discharged from the steamer. It was loaded on cars, duty paid, and bills of lading issued to the various parties.

On or about December 23rd, 1920, Lamborn & Company furnished the Bankers Trust Company with a copy of the ocean bill of lading of the "West Cheswald."

I knew when I was discussing the telegram of December 28th with the representative of the Bankers Trust Company that I was not told the entire contents of that telegram. [fol. 178] I was only told about the shipment which they termed as clearance. I knew that there were some other portions of the telegram. I could see from the telegram it was a lengthy telegram.

I saw a letter which I have identified dated January 5, 1921. It has my stamp on it. After that I myself returned to the office of the Bankers Trust Company with all of the

documents pertaining to this case, at which time they were protested.

I testified at a former trial as follows:

"Q. I will ask you specifically whether at that time, January 6th, 1921, the officer or officers of the Bankers Trust Company stated any objection to you as to the form of contents of your draft and shipping documents?

A. No, they did not.

Q. Did you demand payment of the draft?

A. Yes.

Q. On the 6th of January, 1921?

A. Yes, sir.

Q. Was payment made?

A. No, sir.

Q. What became of the papers, the draft and shipping documents which you had taken with you?

A. The draft was protested and the documents were taken back by us."

Redirect examination.

By Mr. Van Doren:

The Gammeter Commercial Corporation purchased a thousand bags, 10 per cent more or less. They refused to take the sugar off the "Washington Maru," on the ground of substitution—substitution of the "Washington Maru" for the "Chifuku Maru." That concern brought an action to cancel the contract, and an injunction. The Blanton Grocery Company refused to take the sugar from the "Washington Maru," on the same ground. Their contract was for 1,100 bags, 1,000 bags, 10 per cent more or less. They brought an action to cancel the contract. The McMahon & Leib Co. refused to take this sugar from the "Washington Maru," upon the ground of substitution of steamers—substitution of "Washington Maru" for the "Chifuku Maru." They didn't want the sugar. The American Stores refused to take their sugar. I testified [fol. 179] the quantity was 7,250 bags but I believe the quantity was 7,150. All four of those parties refused to take the sugar upon the ground that we substituted the "Washington Maru" for the "Chifuku Maru."

We negotiated with the American Stores before they took the sugar, about a week or ten days—a week anyhow. The Blanton Grocery Company took and paid for the sugar after the injunction was vacated. They all wanted sugar from the "Chifuku Maru"; that is what they contended. We had the right to give 10 per cent less on all of these contracts.

If we had given these parties 10 per cent less, with what was left over of the cargo it would have amounted to 1,004 bags. We could have given all of those parties the amount of sugar which the contract called for and had a thousand and four bags left over. There wouldn't have been any objection on their part to taking less at that time, the way prices of sugar were going down.

Recross-examination.

By Mr. Taylor:

That would have made no difference in the final event; we would have simply sold to one party instead of another. We did tender these sugars to the various parties named as subsequently taking it. We delivered 9931 bags. And we made the delivery pursuant to the tender. We kept the tender alive from the time the ship arrived until the time of delivery to our customers.

By Mr. Van Doren:

The American Stores concern was located at Philadelphia, Pennsylvania. Their sugar remained, pending an adjustment of the matter with them, on the steamship wharf where the "Washington Maru" was docked. Mr. Lindgren, the partner in Philadelphia, and myself carried on the negotiations with the American Stores. They finally took the sugar and paid for it. There was an interval when they had refused the sugar. I would say something like a week. It might have been a little bit longer. During that interval the sugar was on the pier of the steamship company, in a separate pile. That week was the latter part of December, around Christmas time.

STIPULATION AS TO TESTIMONY OF CERTAIN WITNESSES

It was stipulated between counsel that the testimony [fol. 180] of James Lutz, John Boham, John Teehan, John F. Nolan, Frederic A. Hamann and William H. Lignante, if read, would show that there was unladen from the steamship "West Cheswald" at Philadelphia, Pennsylvania, on or about December 16, 1920, 1,000 bags of about 224 pounds each, good and merchantable Java white sugar of the net landed weight of 222,680 pounds, as shown by the weighmaster's certificate, Plaintiffs' Exhibit 19, and the invoices already marked in evidence as Exhibit Nos. 20 and 20-A, and which weight certificate and invoices were presented with the drift to the Bankers Trust Company on or about December 23, 1920, and that the duty thereon had been paid to the United States Government and that thereafter the said 1,000 bags of Java white sugar so weighed and so duty paid were laden free on board, that is, free of all charges, on railroad cars at Philadelphia, Pennsylvania, on the lines of teh Pennsylvania Railroad Company, and that the said Pennsylvania Railroad Company duly issued a bill of lading for the said 1,000 bags of Java white sugar, which said bill of lading has heretofore been offered in evidence as Plaintiffs' Exhibit 16-A.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Connor: The plaintiffs offer in evidence the depositions of the following persons, William R. Bassett, Robert L. Goldsborough Francis H. Goecker. On another point entirely we offer the testimony of the witness, Richard Jones, insurance expert. We propose to prove by him that Southgate could have insured this sugar and the diversion from the "Chifuku Maru" to the "West Cheswald" would not have affected his insurance at all. There is an actual policy issued to cover a like case.

The Court: Do you object to this evidence?

Mr. Taylor: Yes.

The Court: The depositions of the three witnesses, Bassett, Goldsborough and Goecker, which you offer relate entirely to the trade meaning and custom with relation to

the term "shipment" as employed in the contract in question?

Mr. Connor: *Connor:* Yes, sir.

The Court: And the depositions were taken in response to the proposed amendment to the plaintiffs' notice of motion?

[fol. 181] Mr. Van Doren: Yes, sir.

The Court: Your objection is the same objection made?

Mr. Taylor: Based upon the same grounds that I interposed to the notice of motion.

The Court: As I intimated I would, when I sustained that motion, I sustain the motion to reject the depositions of these three witnesses in question. The insurance matter I don't recall having heard anything about.

Mr. Van Doren: We save an exception.

Mr. Taylor: The insurance question is simply this, showing the general custom with reference to insurable interest.

Mr. Van Doren: We have taken testimony, if Mr. Taylor will allow me to describe it and your Honor will hear what I have to say, I believe for the first time, definite positive testimony, accompanied by insurance forms showing what is the practice of marine insurance of profits by purchasers in the position of T. S. Southgate & Company and the testimony is to the effect that there is such a practice, that it is well known, long established, that he had a right to take out insurance on profits the moment of making his contract, that such insurance is provided for by settled forms issued by rules of the maritime insurance brokers and that those forms provide for substitution of steamers, naming a new steamer, for diversion of steamers, and that in this case the substitution of the "West Cheswald" for the "Chifuku Maru" would have occasioned no prejudice to such insurance if T. S. Southgate & Company had taken it out, nor would the diversion of the "West Cheswald" when off the Jersey coast, when going to New York, to Philadelphia, be anything more than a mere matter to report to the underwriters, that they would have welcomed that in place of the steamer that was delayed by accident at Port Said, so if that evidence is to be believed and not controverted we have here for the first time evidence of just exactly what is an insurance of profits and whether or not it could be affected

by the substitution which has been complained of throughout this county under this contract and whether or not it could have been affected by the diversion of the "West Cheswald". We had hoped to introduce it so that that ground of sustaining this technical question of original [fol. 182] lading on the "West Cheswald," not being to Philadelphia but "Port Said option New York" might be cut out of the case. We offer it for that reason.

The Court: I haven't read the decision of the Circuit Court of Appeals recently but my recollection is they didn't place their interpretation of the agreement on that ground.

Mr. Van Doren: We are prepared to show by the evidence of Mr. Richard Jones that T. S. Southgate & Company, the bueyer's right of insurance of profits on this thousand bags of sugar, 10 per cent more or less, would not have been prejudiced by any substitution of steamers carrying it; it would only mean a matter of redeclaration of steamers to the underwriters, that that is provided for by the insurance form and that diversion of a given steamer from New York to Philadelphia so as to make delivery at Philadelphia is also provided for by said forms and would not have prejudiced said right.

The Court: As I understand the question, the purpose of the offer of testimony is to meet the suggestion in the opinion that the buyer would have an insurable interest in it during the voyage by reason of the title that would accrue to him under the contract on arrival and delivery and the profits that might be made in case of a rise in market. But "a policy of insurance for the iron on a voyage from Glasgow would not cover a voyage from Leith." That is a quotation from the Supreme Court in Filley v. Pope and the Circuit Court of Appeals has said that that is applicable to this case because in this case although the title to the sugar was not to pass until delivery f. o. b. cars Philadelphia, the buyer had an insurance interest in it and had the sugar market continued to advance he might well have desired to insure it against what he would make from his contract. The insurance effected on sugar from Java to Philadelphia would not have covered sugar bound for New York. I understand the purpose of the offer of testimony is to show that the Court misapprehended the facts in arriv-

ing at that conclusion. I think the evidence is inadmissible under the circumstances.

Mr. Van Doren: Your Honor hakes the same ruling with offer with the depositions the exhibits attached thereto, one a typical binder and the other a certificate of insurance or [fol. 183] application for insurance. We offer these documents marked Plaintiffs' Exhibit Y.

Mr. Taylor: I object.

Mr Van Doren: Your Honor makes the same ruling with respect to them?

The Court: Yes.

Mr. Van Doren: We except. It is conceded between counsel that Lamborn & Company paid the duty on sugar on all of these ships, "Chifuku Maru", "Washington Maru", and "West Cheswald". The plaintiffs rest.

Mr. Taylor: We move for a verdict on the plaintiff's evidence.

Charge to the Jury

Hon: D. Lawrence Groner, Judge: Gentlemen of the jury, this is an action at law brought by Lamborn & Company against the National Bank of Commerce of Norfolk. I have no doubt you gentlemen have understood by now that this is the second trial of this case in this court. The determination of the first trial and the conclusion that I came to was that the rights of the parties was a matter of law and didn't involve any question of fact for submission to the jury, the contract being admitted and, in my opinion, the evidence conclusively showed a compliance with the contract and entitled the plaintiff to a verdict and judgment in its favor.

The case was then taken to the Circuit Court of Appeals and that court held this court in error in so deciding and construed the contract differently from its construction by me at the previous trial and sent this case back for a new trial to be had in accordance with the opinion of that court.

Of course, it is not necessary that I should say to you gentlemen that we are all bound by the findings of the Appellate Court and they have decided that notwithstanding the contract for shipment of sugar of a particular kind and quality was complied with and the tender of the kind and quality of sugar shipped from the identical place provided

in the contract and within the time in the contract, but because the journey of that vessel was not in accordance with the terms of the contract, that is, instead of being destined to Philadephia it was destined to New York, that that was [fol. 184] a breach of the contract, although the vessel ultimately reached, and within the time limit, the port of Philadelphia.

The case has come back now and has been tried again and the evidence, except in one respect, is substantially the same as on the previous trial and the plaintiffs' right to a recovery, of course, depends upon a showing on their part that they had done what they had contracted to do. Admittedly they have done what the Circuit Court of Appeals has held is not a compliance with the contract so that unless there is something new and different in this case than in the former case, without regard to what your views of the rights of the matter might be or my views may be, we are both bound, as I said a moment ago, to carry out the mandate of the upper court.

Now, the plaintiff urges that there is a new element in this case, introduced by the production of the letter passing between the defendant Bank of Commerce and the Bankers Trust Company of New York which is described in those letters as the paying agent of the local bank. I have carefully listened to those letters, the contents of them and the point urged by counsel for the plaintiff that there was an election of remedies and rights, that the defendant in denying the compliance with the contract or carrying out of the contract put the ground upon something other than the ground it now urged in its defense. I don't think the letters bear that construction. I don't think it is possible to give them that slant. I think they are clearly not susceptible of any other conclusion than that while other grounds of defense were urged as a justification for refusal to accept the sugar, the ground now urged was among those and there is no limitation or selection or election of a particular defense and a waiver of all others, so that in the view that I now take of this case, the situation is as it was at the last trial plus the authoritative declaration of the Circuit Court of Appeals that what admittedly was done was not a compliance with the terms of contract. So that it becomes my duty in this case at this time, under those

circumstances, to grant the motion of the defendants' attorney for an instructed verdict in favor of the defendant.

Mr. Van Doren: The plaintiffs respectfully except.

[fol. 185] And the Court further certifies that the foregoing constituted the evidence on behalf of the plaintiffs, and was all the evidence offered and admitted on their behalf.

Given under my hand this 26th day of August, 1925.

D. Lawrence Groner, U. S. D. J.

In United States District Court

Plaintiffs' Certificate of Exceptions No. 2—Filed August 26, 1925

The Court certifies that upon the trial of this cause the plaintiffs offered in evidence the depositions of William R. Bassett, Robert L. Goldsborough and Francis H. Goecker stating that the depositions showed the witnesses named had testified, and the plaintiffs expected to prove by said depositions and the testimony of the said witnesses that at all the times mentioned in the notice of motion for judgment there existed a well known, long established and generally recognized custom among importers and buyers and sellers of imported sugars wherein and whereby the expression:

"F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa."

meant and intended, and was understood as meaning and intending that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to the purchasers was to be made by placing the sugar free on board railroad cars at Philadelphia, Pa., and that the title and property right remained in the sellers

until said delivery to the buyers at Philadelphia, Pa.; and that said words did not mean nor require that the vessels or the goods carried thereon be at the time of shipment destined for Philadelphia, Pa.; and that the said quoted expression was so interpreted and understood by the trade; [fol. 186] but the Court excluded the aforesaid depositions and the testimony of the aforementioned witnesses, declining to allow the introduction thereof, to which ruling of the Court, at the time of said ruling, the plaintiffs excepted and tendered this their second certificate of exceptions, which they pray may be signed, sealed and made a part of the record, and the same is done accordingly, within the time prescribed by law and the Rules and Practice of this Court.

And the Court further certifies that the deposition and testimony excluded by the Court put in narrative form is as follows:

DEPOSITION OF WILLIAM R. BASSET TAKEN IN NEW YORK CITY ON MARCH 30TH, 1925

Direct examination.

By Mr. Bentley:

I reside in New York City. I am connected with Minford, Lueder & Company, whose address is 99-101 Wall Street, New York City.

I have been in the sugar business for thirty-five years; during that period of time I have been a broker handling domestic and foreign refined and raw sugars. Prior to joining Minford, Lueder & Company I had my own concern. I was with Minford, Lueder & Company since January 1st, 1917. My duties with that concern were buying and selling sugars of all kinds. In the course of my duties I bought and sold Java white sugar during the years 1919, 1920 and 1921. Minford, Lueder & Company's dealings in Java white sugar during those years amounted to over 100,000 tons, of which I was personally concerned with three-fourths. During those dealings I came in contact with many other sugar houses; pretty much the whole trade came into our office; we were brokers for a number of large importers and pretty much the whole trade came into our office to buy sugar of us or through us, sugar of various dealers.

I am familiar with the customs and practices of the trade as they existed in 1920. The expression:

"F. O. B. cars Philadelphia, Pa., landed weights, ship-
[fol. 187] ment to be made during August and/or September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia."

had a definite meaning among buyers and dealers of Java sugars in 1920.

"Q. Will you state what that meaning was?

"A. My understanding of such a contract would be that the seller was to ship from Java in the months designated and deliver those sugars without unreasonable delay at Philadelphia and there put them aboard cars without unreasonable delay.

"Q. Was that the general understanding in the trade?

"A. I think so, yes."

That understanding was a general one, well known as far as my experience goes and uniform.

"Q. Will you state whether or not the purchaser had any interest in the form or nature of the ocean bill of lading under such an expression as understood by the trade?

"A. The buyer had the right to be assured that the sugars were shipped from Java in the time designated and the usual evidence of that was the bill of lading.

"Q. And beyond that what interest did the purchaser have in the bill of lading, as that expression was understood among the trade?

"A. Unless the conditions of some letter of credit altered it, that essentially is the meaning. A letter of credit or some special understanding might modify it; but that is the purport of such a contract.

"Q. Will you state whether or not it was the understanding among the trade that under that form of contract the vessel at the time of loading was to be destined for any particular port?

"A. Do you mean by that limited to any particular port?

"Q. No; whether it must be destined for any particular port.

"A. The contract read 'shipment to Philadelphia,' in this case, and that meant that the sugars must be delivered by steamer at Philadelphia. Does that answer the question?

"Q. Yes. Will you state whether or not under that form of contract as understood by the trade the purchaser, the buyer, had any interest in the course and movement of the [fol. 188] vessel or in the incidents of the voyage?

"A. Generally speaking, no. There would be a possible exception in the case of proving unreasonable delay, or anything of that character.

"Q. Were those meanings and understandings you have testified well known and uniform throughout the sugar trade among buyers and sellers of Java sugars in 1920?

"A. Those with whom we dealt had that opinion and understanding."

Cross-examination.

By Mr. Taylor, Jr.:

"Q. Mr. Bassett, you have testified concerning a certain custom with reference to the sugar trade and you have qualified your answer to a question propounded to you by Mr. Bentley that said custom would be qualified or would be overcome where there was in existence a written contract or letter of credit; is that correct?

"A. No. No, sir.

"Q. Would not the letter of credit or the written contract stand or fall on its own terms?

"A. I stated that the certain terms were only to be understood otherwise in case there was something in the letter of credit prescribing different terms, otherwise the understanding was as I have stated.

"Q. The answer which you gave to Mr. Bentley's last question was correct, was it not?

"A. As I understood it, I would like to have it read again.

(Testimony repeated by the stenographer.)

"The Witness: That is perfectly clear.

"Q. But the letter of credit would be controlling in spite of the custom, would it not, Mr. Bassett?

"A. I have seen so many letters of credit, interpreted in so many different ways, that I would not say that there was any possibility of answering that question on my part accurately. That is the honest truth.

"Q. Do I understand then that you would be unable to construe the terms of the letter of credit?

"A. The courts have construed them in various ways, and I would not attempt to put down any dictum at all.

[fol. 189] "Q. You were questioned with reference to certain words, namely, as follows:

'F. O. B. cars, Philadelphia, Pa., landed weights, shipment to be made during August and/or September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.'

and you stated what was required of the seller in such case. Did or did you not say, Mr. Bassett, that at the time of the shipment the goods were to be shipped on a vessel destined for Philadelphia?

"A. My recollection is that I said, 'shipment from Java, delivery by steamer at Philadelphia.' That was the usual custom. If you will read me where I have stated differently, that might affect this answer. I do not think I used the word 'destined' at all.

"Q. When would that destination be determined under provisions of the question such as I have quoted to you in my question?

"A. When would the destination be determined? I have stated it would be shipment from Java, delivery at Philadelphia without unreasonable delay.

"Q. In other words, in your opinion, the vessel would not have to be destined for Philadelphia at the time the goods were loaded on board?

"A. That is correct."

DEPOSITION OF ROBERT L. GOLDSBOROUGH TAKEN AT NEW YORK CITY ON MARCH 30TH, 1925

Direct examination.

By Mr. Bentley:

I reside at Stapleton, Staten Island, New York. My occupation is that of buyer and seller of raw sugars. I am connected with E. Atkins & Company, of 90 Wall Street, New York City.

I have been in the sugar business for about twenty-six years. During that period of time I have been buying and selling practically all of the time. I was connected with L. W. Minford & Company, now Minford, Lueder & Company, for about thirteen years. I left them in 1912. I was connected with Bowerman Brothers at 83 Wall Street, New York City, for eight years from 1912 to 1920. Left them on [fol. 190] July 1st, 1920, when I went to E. Atkins & Company, where I have remained ever since. During that period of time I have been engaged in buying and selling sugars of all kinds—raw and refined—in New York City. I have dealt in Java White Sugars as broker when I was with Bowerman. During my experience I have bought and sold large quantities of Java sugars, many cargoes of it. I am not able to state how many bags, but a cargo generally varies from 1,000 tons to 5,000 tons. I have made a large number of contracts for the purchase and sale of Java Sugars. I think it would be less than 100. In the course of my business I came in contact with other buyers and sellers of Java sugars. I cannot say that there was a large number of them because I do not think there was any large number in the whole business. I met most of them and knew them all.

I am familiar with customs and usages and understandings in the trade as they existed in 1920. It was part of my business, I do not say that I know it all.

The expression: "F. O. B. cars, Philadelphia, Pa., landed weights, shipment to be made during August and/or September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia" had a definite meaning among buyers and sellers of Java sugars in 1920.

"Q. Will you state what that meaning was?

"A. I would say that the seller would have to have his bill of lading dated either August or September and he would have to deliver the sugars aboard cars at Philadelphia.

"Q. What was that meaning if there was one in respect to the form of the ocean bill of lading?

"A. The ocean bill of lading would have to be dated August or September.

"Q. Anything beyond that?

"A. No. I think it would have to be dated August or September. It would not have to be dated both months, but it would either have to be August or September, with a certain date, the day the sugars were delivered to the steamer.

"Q. Will you state what was the meaning of that expres- [fol. 191] sion in respect to the buyer's interest in the form of the bill of lading?

"A. The only interest the buyer would have in the bill of lading would be that it was according to the contract, that is, the bill of lading must be dated according to the shipment.

"Q. Will you state what was the understanding of the trade in respect to the buyer's interest in the course and movement of the vessel or in the incidents of the voyage?

"A. I do not think a buyer would have any real interest in the course of the steamer coming over, except that naturally he would want it to come over as soon as it could after it was shipped.

"Q. But otherwise what, if any, interest?

"A. I do not think he would have any interest.

"Q. State whether or not it was the understanding of the trade that under that form of words the vessel at the time of loading must be destined for any particular port.

"A. No. It would not have to be destined for any particular port as long as the ship went to the port that it was bought for: it would have to go to Philadelphia.

"Q. And will you state whether those understandings and practices as you have testified to them were well known and uniform among buyers and sellers of Java sugars in 1920?

"A. Among the regular trade buyers, experienced buyers, it was; but there were a great many people bought sugars who did not understand the custom.

Cross-examination.

By Mr. Taylor:

"Q. Mr. Goldsborough, you stated that under the provisions as read to you or stated to you by Mr. Bentley, namely, that of 'F. O. B. cars, Philadelphia,' etc., it would

be required of the seller that the bill of lading be dated some time in August or September, 1920.

"A. If it was sold for August-September shipment.

"Q. I mean under the terminology which he used in his question. At that time what destination would be shown in the bill of lading for a particular shipment of sugars under those terms?

"A. I do not think it would be necessary to show any destination.

"Q. Did you not, Mr. Goldsborough, attempt or did you not say what would be expected of the seller in com- [fol. 192] plying with those conditions which have been recited?

"A. It would be expected of the sellers to deliver the sugar at Philadelphia.

"Q. How would you determine whether or not that was a shipment to Philadelphia?

"A. By the steamer going to Philadelphia.

"Q. And is not the shipment made when those goods are loaded on board the vessel or vessels during the months required?

"A. No, not according to my interpretation; for we often ship goods for August and ship them to any port after the clearance.

"Q. But where it is required that they be shipped to Philadelphia, would not that destination be named in the bill of lading covering the shipment in question?

"A. No, not necessarily. I think that a shipper would have a right to bring the sugars to New York and ship them by rail from here to Philadelphia, as long as he delivered them in cars at Philadelphia.

"Q. Where it is required to be shipped by steamer or steamers from Java to Philadelphia?

"A. Did the contract call for shipment from Java to Philadelphia; direct shipment?

"Q. The contract required this 'f. o. b. cars, Philadelphia, Pa., landed weights, shipment to be made during August and/or September, 1920, at option of the sellers from Java by seamer or steamers to Philadelphia.'

"A. The steamer did go to Philadelphia.

"Q. Do you know whether or not it was intended that it was to go to Philadelphia at the time the cargo of sugars was loaded on board at Java?

"A. I do not; but I should not think that would make any difference."

Redirect examination.

By Mr. Bentley:

According to the understanding in the trade under the form of language quoted it is not necessary for the ship on which the sugars have been laden to call at Philadelphia as its first American port of call. According to the understanding of the trade a shipment in Java during the contract period under a bill of lading reading "Port Said [fol. 193] option New York" was a shipment from Java by steamer or steamers to Philadelphia, assuming that the vessel proceeded from Port Said to Gibraltar and thence to Philadelphia as her first American port.

Recross-examination.

By Mr. Taylor, Jr.:

"Q. Under a contract of the character of the one which we have before us, in your opinion it would be permissible, would it not, to ship this lot of 1,000 bags of sugar to be delivered to T. S. Southgate & Company from Java to New York and deliver said shipment to the pier at Philadelphia after the same had been transported from New York to Philadelphia by railroad cars?

"A. It would if in the contract it did not say anything about direct shipment to Philadelphia."

Redirect examination.

By Mr. Bentley:

"Q. In your opinion, would it be of importance if it was shown that the vessel on which these sugars were transported from Java to this country had been diverted from New York to Philadelphia?

"A. I think it would be the seller's duty to try to get the sugar to Philadelphia as soon as possible."

Deposition of Francis H. Goecker Taken in New York City on March 30th, 1925

Direct examination.

By Mr. Bentley:

I live at Ridgewood, New Jersey; I am a sugar broker by occupation. I have my own concern, and represent the St. Lawrence Sugar Refineries of Montreal, Canada.

I have been in the sugar business for thirty years. For twenty-four years I was connected with Gravenhorst & Company, New York City, and for eight years I have been [fol. 194] by myself. When I was with Gravenhorst & Company I handled all the details of the sugar. I started from the bottom up, and toward the end I was buying and selling sugar. Since I have been out for myself I have bought and sold sugars of all kind. I bought and sold Java White Sugars at the end of 1919 and in 1920, amounting to approximately 40,000 tons or 400,000 bags. In the course of my activities in buying and selling Java sugars I came in contact with other buyers and sellers of Java sugars, principally with other brokers, about twelve to fifteen. I have made or negotiated at least sixty contracts for Java Sugars.

The expression "F. O. B. cars, Philadelphia, Pa., landed weights, shipment to be made during August and/or September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia," had a definite meaning among buyers and sellers of Java Sugars in 1920.

"Q. Will you state what that meaning was?

"A. I would say that the seller had title to those sugars until they were placed F. O. B. cars Philadelphia.

"Q. What was the meaning or understanding of the trade with respect to the form of the ocean bill of lading?

"A. On a contract F. O. B. cars Philadelphia, there was no ocean bill of lading required; simply a railroad bill of lading.

"Q. Was it necessary that the ocean bill of lading should be in any particular form, as understood in the trade?

"A. I do not think so.

"Q. What was the understanding of the trade in respect to the purchaser's interest in the course and movements of the vessel on which the sugar was transported?

"A. Simply that he was to be told that it was on a steamer and that shipment was made during the months specified in the contract.

"Q. The vessel at the time of loading must be destined for any particular port?

"A. Not necessarily so, no, sir.

"Q. And that was the understanding of the trade as it existed in 1920?

"A. Yes, sir.

[fol. 195] "Q. Were those understandings or practices as to which you have testified well known among buyers and sellers of Java sugars in 1920?

"A. Generally understood, yes, sir.

"Q. And uniform?

"A. Practically uniform.

"Q. Will you state whether or not in 1920 you were familiar with the understanding-, customs and practices of the trade in Java sugars as they existed at that time?

"A. I was.

"Q. And you are now?

"A. I am now, yes, sir."

Cross-examination.

By Mr. Taylor:

"Q. You have testified with reference to what would be expected of the seller in complying with the terms of a contract containing the provisions which have been stated to you in former questions. Did you not have in mind what would be required with reference to delivery and that alone?

"A. No, I would imagine with reference to shipment.

"Q. When would shipment begin?

"A. As soon as it was laden on the steamer.

"Q. And a shipment from Java to Philadelphia would require that it would be shipped, be designated at that time as consigned to Philadelphia, would it not?

"A. The steamer's name would have to be given. Not necessarily to Philadelphia.

"Q. And why not.

"A. Because it could go to any other port.

"Q. Would that be a shipment, then, from Java to Philadelphia?

"A. I think it would.

"Q. You have also stated the interest of the shipper in the lot of sugar in question. Would not the buyer have an insurable interest in that shipment of sugar?

Mr. Bentley: That is objected to on the ground that it calls partly at least for a conclusion of law; it calls for an opinion of the witness and partly at least for a statement of fact in reference to a business with respect to which it has not been shown that the witness has any knowledge or connection.

"A. He would."

[fol. 196] Redirect examination.

By Mr. Bentley:

I have never been engaged in the insurance business. I think that the buyer could insure his profits under the provision quoted. The fact that a steamer had been declared from Java on a certain contract of sugars F. O. B. cars Philadelphia would, I believe, permit the buyer to have an insurable interest on a contract of that kind. I never placed any insurance on a contract of that kind. I never saw a policy of insurance on a contract of that nature, nor did I ever make application to any insurance brokers for such insurance. I feel certain that insurance could be obtained. This certainly is derived somewhat from personal experience; my experience in regard to insurance is limited to c. i. f. contracts.

Recross-examination.

By Mr. Taylor, Jr.:

"Q. Is it or is it not the fact that your experience in handling sugars is limited to c. i. f. contracts?

"A. It is not."

Given under my hand this 26th day of August, 1925.

D. Laurence Groner, U. S. D. J.

IN UNITED STATES DISTRICT COURT

Plaintiffs' Certificate of Exceptions No. 3—Filed August 26, 1925

The Court certifies that upon the trial of this cause, the plaintiffs offered in evidence the deposition of Richard Jones and the exhibits attached thereto, stating that the deposition showed, the witness named had testified, and the plaintiffs expected to prove by said deposition and the testimony of said witness that the buyer, T. S. Southgate & Company, under the form of contract in question had no insurable interest in the sugar until it had been placed f. o. b. cars Philadelphia, Pa., that his right of insurance was limited to a right to insure his profits arising from his contract, and that such right would not have been [fol. 197] affected by a substitution of steamers, the diversion of the "West Cheswald", or the form of the ocean bill of lading under which the sugar in question was carried or the destination intended at the time of loading; but the Court excluded the aforesaid deposition and the testimony of the aforementioned witness, declining to allow the introduction thereof, to which ruling of the Court at the time of said ruling the plaintiffs excepted and tendered this their third certificate of exceptions, which they pray may be signed, sealed and made a part of the record, and the same is done accordingly, within the time prescribed by law and the Rules and Practice of this Court.

And the Court further certifies that the deposition and testimony excluded by the Court put in narrative form and the exhibits annexed thereto are as follows:

DEPOSITION OF RICHARD JONES TAKEN IN NEW YORK CITY ON MARCH 31ST, 1925

Direct examination.

By Mr. Van Doren:

I am forty-nine years old. My business is that of marine underwriter. My place of business is No. 66 Beaver Street, New York City, my business being conducted under my own name. My business is that of marine underwriter

holding agencies for insurance companies. I am marine agent of the New Zealand Insurance Company, and I am the representative and correspondent of the National Insurance Company of Copenhagen. My experience and connection with the business of marine insurance has lasted for twenty-five years; 11 years in New York City and 14 years in the Australasian Colonies. During the whole time I have carried on the business of marine insurance. During my service in the Australasian Colonies I was an officer in the New Zealand Insurance Company, which conducted fire, marine and casualty business. For the last ten years I have been located in New York City with the exception of eight months in which I was employed in Washington by the United States Government to organize and head the Claims Division of the Bureau of War Risk Insurance. [fol. 198] That was in connection with the insurance of soldiers and sailors, what is known as the Veterans' Bureau; it was not connected with shipping. Those eight months were in 1917 and 1918. Since 1918 I have been engaged solely in marine insurance; continuously underwriting marine insurance since 1918.

I am familiar with the course and practice of marine insurance as conducted in New York City, and I know the general nature of marine insurance business as it is done in the Atlantic ports of the United States.

A paper was shown the witness and marked Plaintiffs' Exhibit "X".

(NOTE.—This is the paper offered by the plaintiffs, and admitted in evidence, Rec. p. —.)

I have seen purchase and sale contracts of goods to be shipped, imported and exported; they have come under my notice and knowledge. I have read through the paper marked Plaintiffs' Exhibit "X".

Mr. Van Doren: In the questions which I am about to address to you, Mr. Jones, you may assume, if you please, that Plaintiffs' Exhibit X of this date is an actual contract, a copy of the contract between the plaintiffs Lamborn & Company and T. S. Southgate & Company, which is involved in this action.

"Q. Please state what, of any, marine insurance T. S. Southgate & Company, the buyers mentioned in that paper, Exhibit X of this date, could effect according to course and practice of marine insurance.

"A. On the sugar itself, do you mean?

"Q. In any way at all.

"A. It seems to me from this contract that the only insurable interest which Southgate & Company would have would be some monetary emolument they might make in regard to the sale of the sugar which they are buying under this contract from Lamborn & Company.

"Q. Could the buyer, in your opinion, effect marine insurance on the sugar itself on board?

"A. He has no interest in the sugar from this contract, which reads, 'f. o. b. cars, Philadelphia, Pa.'

[fol. 199] "Q. What specie- of marine insurance, then, in your opinion, and within your experience of the costs and nature of marine insurance as practiced in this city and in other Alantic ports, could T. S. Southgate, the buyer, have effected?

"A. They could have insured their profits or their commissions.

"Q. And there is, then, here in this country a recognized right to insure contracts of that nature?

"A. Throughout the world.

"Q. Is that operative in the United States?

"A. Undoubtedly.

"Q. Have you had occasion to issue policies of marine insurance on profits under contracts of that character?

"A. Yes, sir; I have issued many of them.

"Q. Would, in such a case, the purchaser see you about the matter?

"A. Well, our business is done through licensed marine brokers. We do not in many cases, come in contract with the assured. I have insured many times for T. S. Southgate & Company. That name is quite familiar to me but I do not know them and never have seen them.

"Q. What, in your knowledge, would be the nature of such an insurance policy and how would it be effected?

"A. The broker would present to the underwriter an application calling for a fixed sum, called the 'sum insured' made up of, in this particular case, a certain price per ton on so many tons of sugar to be shipped

by steamer or steamers from Java, East Indies, August-September shipment to Philadelphia. Then the conditions of profits insurance almost invariably follow the conditions of insurance placed on the merchandise itself, the clause usually reading 'to pay the same proportion of particular average as would be paid by underwriters insuring' so many tons of merchandise 'under the following clause', and then the insurance clause would follow.

"Q. Perhaps you have a paper or so which will indicate these clauses clearly, if we call for it later?

"A. Yes, sir, I have.

"Q. Now, we are discussing the question of insurance of profits under that contract.

"A. Yes, sir.

"Q. What inquiry would be made by the broker, or by you if you were acting directly as broker, of the purchaser concerning price or on the subject matter of price?

[fol. 200] "A. The broker would have to make up his total value of insurance by a fixed price per ton of the number of tons of sugar being shipped.

"Q. In comparison with some other market rate or value?

"A. Well, he need not compare. I presume he does, but he need not present that to the underwriter. That is for the underwriter to discover himself.

"Q. How, then, would the question of insurance profits be reached?

"A. Well, it is presumed, marine insurance being a contract of good faith, that the profit declared to be insurable is one that can actually be made or one that has been contracted for.

"Q. That is to say, an existing profit based on market conditions, or, an existing profit based on a resale contract?

"A. Yes, sir; that is just exactly the point.

"Q. In the absence of a showing of such profit, either on existing market conditions or on an actual resale contract, could the purchaser be granted marine insurance on profits?

"A. I see no reason why he should not obtain insurance, if he can get it, but he has to prove his loss if a loss occurred.

"Q. In relation to what date would his profit or loss apply, to the time of taking out the policy or to the time of arrival and delivery of the goods to him?

"A. No. Profit insurance is usually written on a policy proof of interest form.

"Q. Interest at what time?

"A. At the time of the issuance of the policy or binder.

"Q. Then, the question of profits, or not, would relate back to the issuance of the policy or binder?

"A. Yes, sir.

"Q. Assume a case where the market condition was such that the profits of that sugar in this country had fallen from the purchase price contained in the contract, Plaintiffs' Exhibit X of this date, would there be any way of insuring profits then, or, would insurance be made under those conditions?

"A. Insurance would hardly be made subsequent to the sailing of that vessel.

"Q. That is to say, if market conditions were such that the profits of the commodity had greatly fallen, marine insurance on profits would not be feasible, would it?

"A. It certainly would not.

[fol. 201] "Q. Suppose, however, the purchaser, notwithstanding those market conditions, had effected a resale at a profit, then his right to insure his profit would inure?

"A. Surely.

"Q. No doubt about that, is there?

"A. I do not think there is any doubt about it, except the question of the underwriter in regard to the risk he was running.

"Q. Of course, on the sailing of vessels, you understand the difference between a shipment contract and a clearance or sailing contract, do you not?

"A. Yes, sir.

"Q. You observe, do you not, that paper Plaintiffs' Exhibit X of this date, is a shipment contract?

"A. Yes, sir.

"Q. And that the sellers do not make any covenant as to clearance or sailing?

"A. Yes, sir.

"Q. Will you, then, in light of that fact, explain more fully what you mean by conditions at the time of so-called shipment or clearance or both as effecting this insurance of profits?

"A. Marine insurance is usually placed at and from certain ports, the term 'at' having been construed by

courts to mean from the time that the goods are actually accepted by the shipping company—the carrier."

I have with me and produce a policy or binder of insurance of profits under a shipment contract. It is a binder of insurance which was actually effected. It was effected by Frank B. Hall & Co., Inc., marine insurance brokers, for Charles Kurz & Co., and the David Berg Industrial Alcohol Company, and/or all as agents. I personally bound the risk. By that I mean that I accepted the insurance and fixed the rate; I fixed the rate and bound the risk in the New Zealand Insurance Company, Ltd.

The paper produced by the witness was marked Plaintiffs' Exhibit "Y", and the following is a copy thereof:

[fol. 202] PLAINTIFFS' EXHIBIT Y.

Frank B. Hall & Co., Inc., New York

New York, December 22, 1924.

Charles Kurz & Co. et al.:

SS. "Emma Maersk"

Insurance on Anticipated Profits and/or Increased Value on about 7,150 tons of hard molasses in Baskets (full interest admitted—policy proof of interest—without benefit of salvage or right of subrogation).

Underwriters accept notice that this vessel is equipped with motors, not a steamer.

It is understood and agreed that under paragraph six (6) of the U. B. E. A. Clauses, craft and/or lightérage risk in harbors or to the vessel off shore is included at the policy rate, but that any special lighterage to loading ports is held covered at rate to be agreed.

All other terms and conditions remaining unchanged.

Provisional application dater December 18, 1924.

M. Jones.

New Zealand Insurance Co.—$10,000.

(Pencil notation:)

Cargo value @ $16.50 per ton Molasses quoted N. O. Dsct. $30 per ton.

Underwriters and Brokers Emergency Agreement Form.
(Space Reserved for Company's use.)

Cargo application. Policy No. —.
Special risk.
Certificates required. Certificate No. —.
Provisional, Definite. (Indicate by check.)
Duplicate. (Indicate by check.)

[fol. 203] Application for Insurance is hereby made by Frank B. Hall & Co., Inc., as Brokers, in name of Charles Kurz & Co. and/or The David Berg Industrial Alcohol Co., &/or The Publicker Commercial Alcohol Co., &/or all as agents, account of whom it may concern, Loss, if any, payable to them, as interest may appear or order, For the amount stated below, on (Anticipated profit and/or increased value on about 7,150 tons of hard molasses in baskets (full interest admitted—policy proof of interest—without benefit of salvage or right of subrogation).

Anticipated profits &/or increased being valued at $10 per ton Per S. S. "Emma Maersk" and conns.

To be insured lost or not lost at and from Java and/or Tjilatjap and/or Samarang and/or Soerabaja via port and/or ports in any order or rotation to Philadelphia.

Subject to printed clauses on the back hereof (unless otherwise provided hereon) and other Special Conditions as follows:

To pay the same percentage of loss on Anticipated Profits &/or Increased value as would be paid by Underwriters if insuring the hard molasses cargo on the following conditions: "Free of average under $125—unless general or the vessel or the interest be stranded, sunk, burned, on fire or in collision."

Underwriters to pay in full on such cargo as may be jettisoned and/or taken by Underwriters for salvage purposes.

Including also special additional conditions as printed on the back hereof.

Amount under deck $71,500. U. B. E. A. Clause No. 8 deleted.

Rate: — per cent.

Amount on deck & Rate: — per cent.

Brokerage: 10 per cent.

67 Wall Street, New York Dec. 18, 1924.

[fol. 204] Binding for Company

(Stamped):

War Rick Clause-Cargo Binding for applicant

This insurance also covers against war risk subject —— only

Company's clauses, also as follows:

Including the risk of mines, torpedoes, etc. bombs and Aircraft, whether hostile or otherwise.

Average payable irrespective of percentage.

General Average and Salvage charges payable according to Foreign statement or per York Antwerp Rules, if in accordance with the contract of affreightment.

Held covered, at a premium to be arranged, in case of deviation or change of voyage or of any omission or error in the description on the interest, vessel or voyage.

Including risk of craft, raft and/or lighter to and from the vessel. Each craft, raft and/or lighter to be deemed a separate insurance. The Assured are not to be prejudiced by any agreement exempting lightermen from liability.

Direct or otherwise, including transhipment if any.

Binding for Company

Binding for Applicant

(On reverse side)

1. Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or war-like operations, whether before or after declaration of war.

2. Warranted free of loss or damage caused by strikers, locked out workmen or persons taking part in labor disturbances or riots or civil commotions.

3. General Average and Salvage Charges payable according to Foreign Statement or per York-Antwerp Rules if in accordance with the contract of affreightment.

[fol. 205] 4. Held covered, at a premium to be arranged, in case of deviation or change of voyage or of any omission or error in the description of the interest, vessel or voyage.

5. Including (subject to the terms of the Policy), all risks covered by this Policy from shippers or Manufacturers' warehouse until on board the vessel, during transshipment, if any, and from the vessel whilst on quays, wharves or in sheds during the ordinary course of transit until safely deposited in consignees' or other warehouse at destination named in Policy, except that in respect to shipments to the River Plate, the risks under this insurance shall cease upon arrival at any Shed (transit or otherwise), Store, Custom House or Warehouse, or upon the expiry of ten (10) days, subsequent to landing, whichever may first occur.

6. Including risk of craft, raft and/or lighter to and from the vessel. Each craft, raft, and/or lighter to be deemed a separate insurance. The Assured are not to be prejudiced by any agreement exempting lightermen from liability.

7. Including all liberties as per contract of affreightment. The Assured are not to be prejudiced by the presence of the negligence clause and/or latent defect clause in the Bills of Lading and/or Charter Party. The seaworthiness of the vessel as between the Assured and the Assurers is hereby admitted.

[8. Warranted not to cover the interest of any partnership, corporation, association or person, insurance for whose account would be contrary to the Trading with the Enemy Acts or other statutes or prohibitions of the United States and/or British Governments.]*

Annex to Exhibit Y

U B

E A
1918

1. This insurance covers via any routes, direct or other-
[fol. 206] wise, including risk of transshipment, if any, and lighterage whether customary or otherwise.

2. Held covered at an additional premium, if required, in the event of the goods (or any part thereof) hereby in-

[*Matter enclosed in brackets erased in copy.]

sured, being shut out or transferred to other vessel or vessels. In the event of the goods or any part thereof, being discharged short of or carried beyond destination, the Assurers hereby agree to hold the Assured covered at an additional premium, if required, until final arrival of goods at their proper destination and delivery as herein provided.

3. The risks covered by this policy are to include loss, damage, or expense, resulting from explosion, howsoever or wheresoever occurring, even though the insurance be otherwise F. P. A., but it is especially understood and agreed that the above wording is not intended to cover the risks of war, riot or civil commotion, submarines or floating mines, or to in any way prejudice the printed wording of the policy excluding risks of this nature.

4. Goods insured hereunder, while on land conveyances and/or while on docks, wharves, quays or elsewhere on shore, are also covered, irrespective of the terms of average, against loss, damage or expense caused by fire, lightning, floods, rising waters, collision and/or derailment and/or overturning of the conveyance, collapse and/or subsidence of docks, wharves, quays or bridges.

5. Underwriters, irrespective of the terms of average, are to pay the insured value of any package or packages which may be totally lost in loading, transshipment or discharge, also for any loss of or damage to the interest insured which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at port of distress; also to pay landing, warehousing, forwarding and special charges, if incurred.

There is attached to this paper the original binder describing the vessel as the "S. S. Emma Maersk", which was [fol. 207] incorrect, and the endorsement bears a clause:

"Underwriters accept notice that this vessel is equipped with motors, not a steamer,"

and then extends the other clauses in the insurance, which appear on the face of the paper.

Plaintiffs' Exhibit "Y" is a printed form in general use in marine insurance of this character that we are discuss-

ing; it has been in general use since before I was born; it has been in general use since I have been in the marine insurance business, with one exception; that exception is some printing on the back of the form which has been amended from time to time.

"Q. Would the right of T. S. Southgate & Company, if it existed under the conditions of market or of the resale contract and under the contract, Plaintiff's Exhibit X of this date, be affected by the name of any particular steamer.

"A. It could be bound provisionally by 'steamer or steamers' as the contract called.

"Q. In other words, am I to understand that the policy of binder would in that respect follow the language of the contract and say 'steamer or steamers'?

"A. Yes, sir with this small exception; some underwriters would bind that 'approved steamer or steamers' and fix their rate. Other underwriters would permit 'steamer or steamers' to be used, and then in the space for 'rate' would put 'approved steamers,' so much per cent. Personally, I always use the form 'approved steamer or steamers,' and not contract myself to take some steamer that might not be approved, even at a high rate.

"Q. Just exactly what is meant by an approved steamer?

"A. The approved steamer definition is for trans-Atlantic voyages—

"Q. Take voyages from the Far East.

"A. Not less than 1,500 tons, not over 15 years of age, Class 100 A-1 at Lloyds, or equivalent.

"Q. Of course, you have lists of such steamers?

"A. Lloyds Register, yes.

"Q. With the use of such phrases as you have stated it would not be essential in taking out insurance on profits [fol. 208] to give the name of the steamer?

"A. Not until the closing particulars were handed in.

"Q. When would that be required?

"A. As soon as known to the assured.

"Q. Would you make any inquiry at all concerning the ocean bill of lading covering the goods themselves to the vendors?

"A. The ocean bill of lading is practically uniform, and unless some particular risk were asked to be covered, the bill of lading would not be called for. I might explain that

by saying, in the loading of some very heavy material which in the opinion of the underwriter might be too much for the derricks on the vessel, we might ask for a bill of lading, in order to see whether the shipping company or carrier had exempted himself from liability for the loading of that particular interest. I have that in mind, because I have just taken insurance today on that very thing, where a pleasure launch was loaded on the deck of a vessel and I demanded the bill of lading before I would insure from the water to the water.

"Q. In order to see, simply, whether the carrier had exempted himself from liability from all damage to the launch?

"A. Yes.

"Q. That would not relate, would it, to sugar in bags?

"A. No, sir.

"Q. Would not the fact that the sugar which Lamborn & Company intended to deliver to T. S. Southgate & Company in accordance with the paper marked Plaintiffs' Exhibit X for identification of this date had been loaded on board a steamer under a bill of lading reading 'Port Said option New York,' impair or affect in any manner the right of the purchaser so to insure his profits?

"A. No, sir.

"Q. Would the fact that the said steamer carrying the sugars out of which Lamborn & Company were to make delivery to the purchaser under the paper marked Plaintiffs' Exhibit X of this date, while off the cost of New Jersey, on the Atlantic, had been diverted from New York to Philadelphia and caused to enter Philadelphia, would that in any manner affect or impair in the slightest degree the insurance which might have been effected by the purchaser of his profits under his contract?

"A. It would not impair the insurance. It might affect it in regard to the rate, deviation being held covered under [fol. 209] the standard form of policy at a rate to be fixed by the underwriter.

"Q. So that there is a provision, is there not, in the standard form of insurance binder insuring profits under such a contract for the very incident of diversion?

"A. Certainly.

"Q. That is, it is provided for?

"A. Certainly, no commerce could succeed without it.

"Q. It is provided for by the contract of insurance itself?

"A. Yes, sir.

"Q. Would the fact, that after the seller, in this case Lamborn & Company, had declared a certain steamer to the purchaser as carrying sugar and thereafter substituted by redeclaration another steamer, affect or impair the purchaser's insurance of his profits?

"A. Provided the substituted steamer came within the approved classification and there had been no known reported loss to that steamer, there would be no objection.

"Q. You mean, do you not, that such redeclaration of such substituted steamer would of course, have to be effected and made before any loss of the steamer so redeclared?

"A. Yes, sir. It is customary, where a change of steamer name is brought in to the underwriter and the records as to that steamer are not clear, that a warranty is placed on the policy or binder 'Warranted not known or reported loss.'

"Q. And that protects the insured under the new declared steamer?

"A. Yes, sir.

"Q. Leaving his insurance contract intact?

"A. Yes, sir.

"Q. And unimpaired?

"A. Yes, sir.

"Q. Is there a clause, or, are there clauses, in the binder, Plaintiffs' Exhibit Y for identification of this date, which, in terms, relate to deviation of steamer or change of steamer?

"A. Yes, sir.

"Q. Would you mind, please, calling attention to those clauses on the record?

"A. It is clause No. 4 of the B. U. E. A. Clauses, reading 'Held covered at a premium to be arranged in case of deviation or change of voyage or of any omission or error in the description of the interest, vessel or voyage.'

"Q. Please tell us what those letters U. B. E. A. mean?

"A. They stand for the words 'Underwriters and Brokers Emergency Agreement, 1918, adopted by the Board of Underwriters of New York, following the London

[fol. 210] Institute Cargo clauses, 'which have been in effect for a great number of years.

"Q. Have those clauses which you have referred to by those initials 'U. B. E. A.' been in effect uninterruptedly in New York and in American ports on the Atlantic since 1918?

"A. Yes, sir; and for years before that but with the designation 'London Institute clauses,' which was probably considered not patriotic and so they used their own.

"Q. Is there a clause on one or the other of those papers, which constitute Plaintiffs' Exhibit Y for identification of this date, which, in terms applies specifically to deviation of the steamer?

"A. That clause that I have just quoted certainly applies to deviation.

"Q. Do you happen to know the rating of the steamer 'West Cheswald'?

"A. Yes, sir; she is a Shipping Board vessel of something over 3,000 tons, and was last year classed 100 A-1 at Lloyds.

"Q. Was she classed, if you know, in the summer and fall of 1920?

"A. Yes, sir.

"Q. Would she come within the classification of approved vessels?

"A. Yes, sir.

"Q. Would she come within that classification in the summer and fall or autumn of 1920?

"A. Yes, sir.

"Q. Please state, then, whether, in the practice and course of marine insurance, as you know it, whether the fact that after declaring the steamer, the Japanese steamer 'Chifuku Maru' to T. S. Southgate & Company, Lamborn & Company, following a delay to that ship, declared the 'West Cheswald' to T. S. Southgate & Company, would that have affected or impaired to any degree any insurance which T. S. Southgate & Company might have effected under that contract?

"A. No, sir, subject, of course, to the proviso that no known or reported loss had occurred to the substituted vessel.

"Q. Would the fact that the sugar laden on board the West Cheswald at the Island of Java in September, 1920, were put on board and covered by an ocean bill of lading reading 'Port Said option New York' had impaired or affected such insurance rights or the insurance of T. S. Southgate & Company?

"A. You mean insurance insuring something that was to be delivered in Philadelphia?

"Q. Yes, sir.

"A. No, sir, because the vessel could bring the sugar to [fol. 211] New York and it could then be transferred or transshipped to Philadelphia.

"Q. Then, such transfer or transshipment from New York to Philadelphia would not have affected the insurance?

"A. No, certainly not; it is held covered, of course.

"Q. Would the fact that the West Cheswald, as she neared the American coast and while two or three days off, had been diverted by wireless on the high seas and caused to come into Philadelphia with her cargo of sugar consigned to Lamborn & Company, have impaired and interfered with the right of T. S. Southgate & Company under any insurance they could have taken out with their contract with Lamborn & Company, called Plaintiffs' Exhibit X of this date?

"A. None whatever.

"Q. In the course and practice of marine insurance, have you known of change of steamers to be effected by the insured?

"A. Yes, very frequently.

"Q. Would you say that was a frequent or infrequent occurrence?

"A. I should say it was fairly frequent.

"Q. Is any objection made to continue the insurance in case of change of name of steamers?

"A. Not unless the changed vessel is one that an underwriter would not accept.

"Q. It depends on the vessel being within the approved class?

"A. Yes, sir.

"Q. So that, assuming that a purchaser in the position of T. S. Southgate & Company having a contract with Lamborn & Company such as the paper marked Plaintiffs' Ex-

hibit X for identification of this date, received notice from the vendors of substitution of the steamer, would he have anything more to do than to report the name of the new steamer to the underwriters?

"A. That would be sufficient.

"—. And, is it a fact, then, that the insurance, assuming the steamer to be in the approved class, would continue as valid as before?

"A. Yes, sir.

Cross-examination.

By Mr. Taylor:

"Q. I believe that you testified that, under a contract similar to the one existing between T. S. Southgate & Company and Lamborn & Company, providing for the shipment [fol. 212] of 1,000 bags of White Java sugar f. o. b. cars, Philadelphia, Pa., landed weights, shipment to be made during August/September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pennsylvania, the buyer under that contract, had an insurable interest; is that correct, sir?

"A. It is possible for him to have an insurable interest.

"Q. When would that insurable interest attach?

"A. As soon as he signs the contract to buy that sugar.

"Q. The interest, then, would attach prior to the delivery of goods, f. o. b. cars at Philadelphia, Pennsylvania?

"A. Your question is not quite clear, from an underwriting point of view. You speak of 'interest.' There can be several interests on this particular shipment of sugar. The sugar itself is one interest. Lamborn & Company had an interest in the sugar. I did say that it was possible for Southgate & Company, under this contract, to have an interest, which would be commissions that they might earn, profits, as was suggested, or any other emoluments that might come to them from the sale of the sugar which they had contracted to purchase. Southgate & Company could not insure that sugar, because, in that case, there would probably be double insurance, Lamborn & Company being the owners of the sugar no doubt, had it covered by marine insurance.

"Q. But Southgate & Company could insure the profits to be derived from the sale of that sugar?

"A. Certainly, yes.

"Q. And, how soon could they insure the profits to be derived from the sale of that sugar with a marine underwriter under the terms of this contract?

"A. Well, as I said before, any time after they purchased that sugar on which they had a problematical profit.

"Q. Would they have that right to insure profits when the sugar was loaded on the steamer at Java?

"A. Yes, sir, if that is when their profit occurred, surely.

"Q. Suppose Southgate & Company had insured their profits on the sugar to be purchased by them under the contract requiring 1,000 bags of white Java sugar, f. o. b. cars, Philadelphia, Pennsylvania, landed weights, shipment to be made during August/September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pennsylvania, that contract of insurance would have covered a shipment of sugar meeting the requirements of [fol. 213] that contract, and none other, would it not?

"A. Yes, sir.

"Q. You have mentioned something about approved steamers in the particular contracts of insurance which you negotiate?

"A. Yes.

"Q. That is a precaution taken by you for your own protection is it not?

"A. It is a precaution taken by all underwriters, yes.

"Q. Is it not possible to make other changes in a contract of insurance?

"A. There are various changes that can be made in a contract of insurance.

"Q. So, there is no standard form; that remains as between the parties as to what the requirements shall be?

"A. Only the conditions of insurance are the standard form.

"Q. In the discussion of the marine insurance policy, I believe you stated that that form was taken from the English form of insurance?

"A. I said that these particular conditions known as the U. B. E. A. conditions were taken from the London Institute Cargo clauses, an English form.

"Q. Isn't it true that marine insurance and rules of shipping are largely derived from the English practice?

"A. Yes, sir.

"Q. That is, the forms and customs?

"A. Yes, sir.

"Q. You were asked a question with reference to the subsequent declaration of another steamship to T. S. Southgate and T. S. Southgate & Company were notified of the subsequent declaration of this steamer, the West Cheswald, and I believe you stated that such subsequent declaration would not impair the rights of T. S. Southgate & Company?

"A. Yes, sir.

"Q. That is true, provided the terms of the contract between T. S. Southgate & Company and Lamborn & Company were complied with in every particular, is it not?

"A. The marine underwriter is not interested in the terms of the contract. All he is interested in is the interest of Southgate & Company in that particular shipment or that particular interest, as we call it, or merchandise.

"Q. In view of that, Southgate & Company would have no interest in any other shipments of sugar, except that which met the requirments of the contract in question?

"A. I cannot answer that. I do not know anything about the business arrangement with regard to the de-[fol. 214] livery of the sugar. If an assured, or an assured's broker presents a risk to us, there is an implied warranty that he has an interest in that risk. If he has not an interest in that risk his policy of insurance is void. That is one of the implied warranties that govern the whole business of marine insurance.

"Q. And, therefore, any change of interest on the part of the insured would invalidate the policy of insurance as between the marine underwriter and the assured?

"A. Not so long as it is notified to the insurance company and indorsed on the policy.

"Q. And that change is accepted by the underwriters?

"A. Yes.

"Q. You have likewise testified to several policies of insurance, under which the names of vessels have been

changed from time to time, or, the vessels themselves have been changed?

"A. The carrying vessel is changed?

"Q. Yes.

"A. That is quite frequently done.

"Q. But you do not recall the contract the assured may have had with the shipping company or with the vendor of the cargoes contained on those very ships?

"A. We are not interested in that at all; we never call for it. I can probably clear up that last question, if you wish.

"Q. Yes, go ahead.

"A. Losses are settled according to a very old established custom, known among underwriters as the 'usages of Lloyds,' and all policies on cargo insurance contain a clause requiring losses to be presented according to those usages. Lloyds usages require, in support of a claim, the invoice of the goods to establish ownership, the bill of lading to establish their shipment by a certain vessel, the Master's protest to establish a peril of the sea, which is covered under the policy, and a final survey to establish the measure of damage. Those are the usual papers required in the ordinary marine disaster, and, of course, we, therefore, accept an application for insurance in the belief that the assured has an actual interest in those goods, which he is prepared to prove by the production of his invoice and bill of lading, if he claims a loss."

Redirect examination.

By Mr. Van Doren:

"Q. That last answer is one where you were speaking [fol. 215] of marine insurance by the owner of the goods?

"A. Yes, sir. I made that explanation because the questions asked by counsel seemed to me to suggest that the underwriter should know all about the contract of sale and purchase between the shipper and the consignee.

"Q. And, as to that matter, what is the practice of the marine insurance business?

"A. We are not interested in the contract of purchase. We are only interested in the ownership of the goods, which has to be proved by the proper certified invoice.

"Q. You speak of cases where the ownership is the subject matter of the insurance?

"A. Yes, sir.

"Q. Where the ownership of the goods is not the subject matter of the insurance by profits by a prospective purchaser under goods to be delivered at an American port, then, that purchaser likewise, in making a counterclaim under his contract of insurance, will have to establish his interest in profits and in the loss of the goods, as bearing on that; is that a fact?

"A. With one variation. The profits, or anticipated profits, as they are called in insurance, are customarily insured policy proof of interest.

"Q. Called a 'P. P. I.' policy?

"A. A 'P. P. I. policy. This is a custom that has crept in for the very reason explained previously, that the owner of the goods themselves is the man who owns and controls the invoice and the bill of lading. The insurer of the profits with a perfectly good insurable interest would, therefore, be precluded in case of a loss from producing those papers that are necessary under the ordinary merchandise insurance.

"Q. That would have to be produced by the owner of the goods to collect his insurance?

"A. Yes, sir. In this particular case, had one of those vessels gone down, containing that particular sugar, Lamborn & Company, I presume the owners of the sugar, would have produced the papers for the collection of the value of that sugar as shipped by them. Southgate & Company could only have produced a policy insuring anticipated profits.

"Q. And their contract?

"A. And their contract, to show that they had done that, that they were the prospective owners of that sugar and that policy would have been accepted as proof of interest.

"Q. In other words, you have drawn a distinction between marine insurance, where the owner of the goods [fol. 216] might trade against perils of the sea, and insurance by a purchaser, under a contract for delivery yet to be made to him, of prospective profits on that contract?

"A. There is a distinction in the method of adjusting the losses.

"Q. Are they not clear and distinct subject matters?

"A. Yes, sir.

"Q. Of insurance?

"A. Yes, sir.

"Q. Now, these forms about which counsel inquired, are they peculiar to your business, or, are they in common and general use?

"A. Which forms do you mean?

"Q. I refer specifically to the papers marked Plaintiff's Exhibit Y for identification of this date.

"A. Oh, they are in common use.

"Q. At all American ports on the Atlantic?

"A. Yes, sir.

"Q. And, have they been in use at least continuously since 1920?

"A. Yes, sir.

"Q. Is there very much taking out of insurance on profits in this country, Mr. Jones, by purchasers situated as Southgate & Company are, under that contract, which is marked Plaintiffs' Exhibit X for identification of this date?

"A. Yes, sir; there is quite a considerable amount of it done in rubber, coffee and molasses from the Far East, a little done on olive oil and Italian products.

"Q. I mean, insuring profits by the purchaser.

"A. Yes, on long trips, where the market is likely to fluctuate quite considerably between the time of shipment of the goods and the arrival here the contracts for sale are made while the vessel is on the voyage and the profits insurance is taken out to cover anticipated profits, sometimes before the sailing of the vessel and sometimes when the vessel has almost reached the port of destination.

"Q. At various stages of the adventure?

"A. Yes, sir.

"Q. But, is it not a fact, that the purchaser may so insure the profits inuring to him upon his entering into, signing and delivering the contract?

"A. Yes, sir.

"Q. Let me make that question a little clearer to you. Is it a fact, then, that the purchaser may apply for and obtain his insurance upon profits as soon as he has a contract signed by both parties?

[fol. 217] "A. If that contract gives him an interest in that venture, he can insure that interest.

"Q. And proof of that interest he has to make, in the event of loss?

"A. Yes.

"Q. You would assume his interest from the contract, would you not?

"A. We would assume his interest from the contract and issue him a policy proof of it.

"Q. Leaving him to prove his interest in the event of its loss?

"A. He would not have to prove any further interest than the production of the policy, unless he had voided the insurance.

"Q. Could he take out such interest even before loading?

"A. Yes, sir.

"Q. Or at any time after loading before the arrival of the vessel?

"A. Yes, sir.

"Q. That is to say, the vessel being not lost?

"A. Yes, sir.

"Q. So that, any purchaser under a contract of that character, can insure his profits, may he?

"A. Yes, sir.

"Q. And such insurance is not impaired by either diverging or by substitution of or redeclaration of carrying steamer?

"A. It is not violated by that either, only as regards rate.

"Q. What circumstances would affect the rate by divergence?

"A. An increase hazard is what the underwriter charges for. It would be hardly fair to say that increased distance might cause an additional rate to be charged, because, by increasing the distance, you might avoid some known hazard. The entrance to an extra port is a hazard we usually charge for, if not in the direct line of the voyage.

"Q. Would a change of destination from New York to Philadelphia while the vessel was 40 to 60 miles off the New Jersey coast be one which would increase rates?

"A. A vessel coming through the Mediterranean?

"Q. Yes.

"A. No, sir; that would probably be to the advantage of the underwriter.

"Q. On the subject matter included with the redeclaration of a steamer, the employing of a new steamer from which the cargo was delivered, what circumstances there would increase the rate charged by the underwriter?

"A. A vessel of somewhat inferior class or a vessel by some different route are two that I can think of right offhand.

"Q. Were any of those circumstances thus increasing [fol. 218] the rate incident to the substitution of the West Cheswald or her diversion from New York to Philadelphia?

"A. I cannot tell you that now, sir.

"Q. What would you have to examine to tell that?

"A. I would have to examine the movement of those vessels at that particular time. I have compared the two vessels. They are of similar class, one no inferior to the other, except, probably for Japanese ownership, which is inferior to a Shipping Board owned vessel, they are about the same size, they are well within the age limit but I do not know what particular course they took.

"Q. Assume that they both took a course from Java, through the Indian Ocean and through the Red Sea, then through the Canal into the Mediterranean, and across the Atlantic by way of the Straits of Gibraltar, one coming to Philadelphia and one to New York and diverted, as I have said, to Philadelphia, would not these voyages be practically identical?

"A. Yes, sir.

"Q. Would the courses and nature of those voyages be circumstances tending to inc-ease the rates of insurance?

"A. Presuming that the ports of call——

"Q. Assuming that they made the same ports of call and that for coaling.

"A. Then, there would be no difference.

"Q. In fact, Mr. Jones, is it not true that the substitution of a steamer a short distance off the coast for a steamer having met with an accident and tied up at Port Said would have been a change which the underwriters would have welcomed?

"A. I am to understand that at the time that one steamer was at Port Said and the other was almost to this coast?

"Q. Yes.

"A. Yes. Of course, that was a change that would be to the advantage of the underwriter and that is what I meant by not being so definite without knowing the movements of the vessel how the rate would be effected. Had the vessel close to the coast of the United States been the one to break down and then go into Bermuda and then we were notified that the tramp was coming and another boat following, there would be an addition to the rate.

"Q. Assume the change was this. That the newly declared steamer was close to the American shore, while the formerly declared steamer was delayed by an accident to machinery at Port Said, would not the underwriter have [fol. 219] been glad to take the newly declared steamer?

"A. Certainly.

"Q. It would have minimized the underwriter's risk, would it not?

"A. Yes, sir.

Mr. Van Doren: That is all.

Recross-examination.

By Mr. Taylor:

"Q. When ascertaining the insurable interests that the buyer of a lot of sugar might have, would you not have to see the contract of purchase between them?

"A. No, sir. The declaration by the firm or by the assured as to the price of his sugar would be sufficient to satisfy an underwriter, because, if that declaration is not absolutely true, he voids his insurance.

"Q. And the proof of interest would be required in *in* the event of loss and not until that time.

"A. Well, as I explained before, in this country, the policy is accepted as the proof of interest. It would only be in case of suspicion of fraud that we might then go further than that. In England, however, he has to actually prove his interest.

"Q. You have also stated that the rate of insurance might be increased, dependent upon the number of ports at which a vessel carrying the cargo in question would stop during the voyage?

"A. Well, the deviation to ports. All vessels, tramp vessels of that nature, are 'via port or ports,' that meaning port or ports in the line of voyage.

"Q. Naturally, at the time the insurance was taken out, you would have to know such deviations or intended deviations so as to be able to fix the rate of insurance?

"A. No, we fix the rate as a direct voyage and we follow the vessel and see what deviation she has made and charge for it on arrival of the vessel or on the final closing."

Given under my hand this 26th day of September, 1925.

D. Lawrence Groner, U. S. D. J.

[fol. 220] In United States District Court

Assignments of Error—Filed August 27, 1925

The plaintiffs in this action, in connection with their petition for a writ of error, assign the following errors and aver that the Court erred in the following particulars:

1

In striking out from the plaintiffs' amended notice of motion for judgment certain portions of the allegations thereof, to-wit:

"That by the words in said letter of credit dated May 11, 1920, 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.' the parties—you and the undersigned—herein meant and intended, and you understood that the said 1,000 bags of sugar were to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to T. S. Southgate & Co. was to be made by placing the said 1,000 bags free on board railroad cars at Philadelphia,

and that the title and property right in said goods remained in Lamborn & Company, the undersigned, until said delivery at Philadelphia to T. S. Southgate & Co.

That at all the time herein mentioned there existed a well-known, long established and generally recognized custom among importers and buyers and sellers of imported sugars wherein and whereby the expression: 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.,' meant and intended, and was understood as meaning and intending that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or [fol. 221] steamers to Philadelphia, Pa., and that delivery to the purchasers was to be made by placing the sugar free on board railroad cars at Philadelphia, Pa., and that the title and property right remained in the sellers until said delivery to the buyers at Philadelphia, Pa.; and that said words did not mean nor require that the vessel or the goods carried thereon be at the time of shipment destined for Philadelphia, Pa."

2

In excluding the testimony of William R. Bassett, Robert L. Goldsborough and Francis H. Goecker, as set forth in the plaintiffs' Certificate of Exceptions No. 2.

3

In excluding testimony as to the meaning of the following expression in the letter of credit and purchase and sales contract, as used and understood among importers and buyers and sellers of imported sugars and as established by a well-known long established and generally recognized custom: "F. O. B. cars, Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa."

4

In excluding the testimony of Richard Jones and the Exhibits therewith, as set forth in plaintiffs' Certificate of Exceptions No. 3.

5

In excluding testimony tending to show that the purchasers under the contract in question had no right of insurance in the goods, that the buyers' only right of insurance was with respect to the profits arising under the contract of purchase and sale, and that such right of insurance was not affected by substitution of steamers, the diversion of the "West Cheswald" while on the high seas, or the form of ocean bill of lading covering the sugar owned by Lamborn & Company on the "West Cheswald."

[fol. 222]

6

In excluding testimony with respect to the general custom and practice as to marine insurance in connection with contracts in form similar to the contract of purchase and sale dated April 23, 1920, between the plaintiffs and T. S. Southgate & Co.

7

In holding that the plaintiffs failed to make shipment from Java to Philadelphia; that the shipment made by Lamborn & Company on the S. S. "West Cheswald" was not a shipment from Java to Philadelphia; that Lamborn & Company's shipment of sugar on the S. S. "West Cheswald" under a bill of lading reading "destination Port Said, option New York," which sugar was carried by the S. S. "West Cheswald" to Philadelphia as her first American port of call, was not a shipment from Java to Philadelphia; that to comply with the contract the S. S. "West Cheswald" must at the time of lading at Java have been destined for Philadelphia.

8

In holding that the plaintiffs failed to comply with the provisions of the letter of credit in suit.

9

In failing to hold that the defendant based its refusal to pay the draft upon the ground of substitution of steamers and that the defendant was bound by the position so taken.

10

In holding that the defendant might assert in its defense grounds other than that of substitution of steamers, to-wit, an alleged failure to comply with the shipment provisions of the letter of credit.

11

In failing to hold that the defendant was estopped to [fol. 223] assert any other defense than that of substitution of steamers.

12

In permitting the Bank to assert and rely on Lamborn & Company's alleged failure to comply with the contract of purchase and sale between Lamborn & Company and T. S. Southgate & Co.

13

In granting the defendant's motion upon the conclusion of the introduction of the plaintiffs' evidence to direct a verdict in favor of the defendant, and in directing such a verdict.

14

In entering judgment for the defendant upon the verdict of the jury.

15

In that the judgment was contrary to law.

16

In that the judgment was contrary to the evidence.

In that the judgment was not sustained by the evidence.

Wherefore, the plaintiffs pray that the judgment of the District Court may be reversed and the verdict of the jury set aside and a new trial granted.

Baird, White & Lanning, Counsel for Lamborn & Company.

[fol. 224] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed August 24, 1925

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

ARTHUR H. LAMBORN et al., Surviving Partners of the Co-partnership firm of Lamborn & Company, Plaintiffs,

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA, Defendant

It is Stipulated between counsel for the parties that the foregoing is a true and complete transcript of the record in this cause so far as the parties deem same necessary and material to print; that the Clerk of this Court may transmit the same to the Clerk of the Circuit Court of Appeals for the 4th Circuit at Richmond, Virginia, where it shall be printed under the supervision of the Clerk of that Court in accordance with Rule 23, and that all original exhibits shall be certified up to the Circuit Court of Appeals by the Judge of this Court as original papers to be used by either party in argument of this case.

Baird, White & Lanning, Counsel for Lamborn & Company. Tazewell Taylor, Counsel for the National Bank of Commerce of Norfolk.

In United States District Court

Memorandum of Original Papers Accompanying Transcript of the Record

(1) Petition for writ of error.
(2) Order allowing writ of error.
(3) Writ of Error.
(4) Citation, service accepted.

[fols. 225 & 226] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 227] In the United States Circuit Court of Appeals for the Fourth Circuit

No. 2452

Arthur H. Lamborn, Gerard P. Tameling, Charles C. Riggs, Henry B. Hutchings, Clarence C. Troup, Karl E. Lindgren, George H. Logan, N. Nelson Keen, and B. Wheeler Dyer, Surviving Partners of the Copartnership Firm of Lamborn & Company, Plaintiffs in Error,

versus

The National Bank of Commerce of Norfolk, Virginia, a National Banking Association or Corporation Created by and under the Acts of Congress of the United States, Defendant in Error

Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk

Minute Entries

October 2, 1925, the transcript of record is filed and the case docketed.

Same day, the original petition for writ of error, order allowing writ of error, writ of error, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of Edward R. Baird, Jr., Louis O. Van Doren and H. G. Connor, Jr., is entered for the plaintiffs in error.

October 5, 1925, the appearance of Tazewell Taylor is entered for the defendant in error.

[fol. 228] November 3, 1925, twenty-five copies of the printed record are filed.

December 15, 1925, stipulation of attorneys as to the time for the filing of their respective briefs filed.

December 17, 1925, original exhibits (documents) are certified up.

Argument and submission January 25, 1926, omitted in printing.

In United States Circuit Court of Appeals

[Title omitted]

[fol. 229] In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk

(Argued January 25, 1926. Decided October 19, 1926)

Before Waddill, Rose and Parker, Circuit Judges

Louis O. Van Doren (Baird, White & Lanning; Edward R. Baird, Jr.; H. G. Connor, Jr., and Van Doren, Conklin & McNevin on brief) for Plaintiffs in Error, and Tazewell Taylor for Defendant in Error.

Opinion—Filed October 19, 1926

Rose, Circuit Judge:

This is the second time this case has been here. What has been said (2F) (2d) (23) need not be repeated.

At the new trial the learned District Judge thought that the plaintiffs had offered no admissible testimony strengthening the case once held insufficient and he directed a verdict for the defendant.

The plaintiffs assign seventeen errors which resolve themselves into three contentions.

Alleged Waiver by the Defendant

The plaintiffs say that defendant waived its right to rely upon the defense which we held decisive in its favor. The argument is, the defendant when it refused to honor the letter of credit assigned reasons for its conduct, and among them it did not include the fact that the sugar had been shipped from Java to New York and not to Philadelphia. It requires a rather narrow construction of what defendant did and said to justify a holding that the objections it made did not cover the defense upon which it now relies. The [fol. 230] claim of the plaintiffs that if in the first instance their attention had been more pointedly called to it, they could and would have tendered sugar which had been originally consigned to Philadelphia, depends upon doubtful questions of law and speculative assumptions of fact. It is also worthy of note that while plaintiffs insist that defendant may not amend or supplement its out of Court statement of its grounds of defense, they claim that they are free to raise a point at the second trial which they did make at the first. In the former trial below and in this Court, the plaintiffs treated the defense in question as properly before the Court. They as well as their adversary argued it elaborately. It is true they said it was bad in law, but no hint was given that the defendant was estopped from setting it up. It was given the full and painstaking consideration as well of the District Court as of this. Under these circumstances the learned Judge below did not err in rejecting the contention now made.

Evidence as to Custom of Trade

After the case was remanded to the District Court the plaintiffs asked leave to amend their motion for judgment, a pleading which, under the modern Virginia practice, may take the place of a declaration at common law. They wished to insert in it a properly phrased allegation that there was in the trade in imported sugars a custom by which a provision that sugar should be shipped from a foreign port to

one seacoast city in this country was understood to permit the doing of what the plaintiffs did. In the exercise of his discretion the learned District Judge refused to permit the amendment to be made. In so doing he said among other things:

"The Circuit Court of Appeals in this case in a very elaborate opinion has decided the meaning of the precise language in the contract that is now sought to be construed differently by virtue of proof of custom or intent. The effect of allowing an amendment of this kind at this time would be, if it were sustained by proper evidence to have a cause in which the Circuit Court of Appeals had construed a contract of sale, in which they found no ambiguity, no difficulty in determining the precise and exact meaning of the parties and had finally concluded [fol. 231] what the parties themselves meant and intended by the contract and having that determination before me, to find that it meant something entirely different, that its language was not plain and unambiguous, that there was something about it so obscure that it required the introduction of evidence of a custom to determine what it did mean and finally determining that it meant something different from what the Circuit Court of Appeals had decided, would be a thoroughly anomalous condition of affairs. Hence it seems to me that to allow this amendment to be made now would be a purely idle thing, a useless thing since in the very nature of things when the evidence to support it came to be introduced an objection would be made on the ground of its inadmissibility because the instrument speaks for itself, does not require the aid of custom to interpret it and would therefore have to be overruled and refused admission on that account."

We see no occasion to add anything to this clear statement which is also a complete answer to such of the assignments of error as are directed to the exclusion of the subsequently offered testimony as to the custom in question.

Evidence as to Underwriting Practice

The refusal of the Court to receive proffered evidence as to underwriting practices is not open to attack here.

That testimony did not bear upon any issue in the case, except in the most remote way. It was at best directed to a purely collateral matter. Its exclusion could not have prejudiced the plaintiffs and was well within the discretion of the trial Judge.

Affirmed.

[fol. 232] In United States Circuit Court of Appeals

[Title omitted]

In Error to the District Court of the United States for the Eastern District of Virginia

Judgment—Filed October 25, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

John C. Rose, U. S. Circuit Judge.

October 25, 1926.

[fol. 233] In United States Circuit Court of Appeals

Minute Entries

On another day, to-wit, November 26, 1926, the mandate of this Court in this cause is issued and transmitted to the U. S. District Court at Norfolk, Va., in due form.

Same day, the original petition for writ of error and order allowing writ of error are returned to the Clerk of the District Court at Norfolk, Va.

Same day, the original exhibits (documents) are returned to the Clerk of the District Court at Norfolk, Va.